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ABSTRACT

This manual for state agencies suggests law and policy changes that meet the new Federal requirements under Title I of the Family Support Act, passed in 1988 and the Title IV-D of the 1974 Social Security Act, both of which enable states to act to locate parents and enforce child support orders. Chapter 1 of this report is the introduction. Chapters 2 through 9 treat key aspects of the new federal law or changes in the existing law with further discussion of the implications for state policy and recommendations for implementation. These chapters include the following: "The State's Child Support Program: Time Frames, Staffing, Automation"; "Parent Locate Services"; "Establishing Paternity"; "Establishing and Modifying Support Orders"; "Enforcing Support Orders"; "Distribution of Support Collections"; "Medical Support Enforcement"; and "Child Support and Work and Training Programs." Chapter 10, "Looking to the Future: Child Support as an Anti-Poverty Strategy," discusses child support policies and their possible role as part of state-wide anti-poverty strategies. Appended are a list of states ranked by grade, grades assigned by states, a list by state giving paternity establishment baseline percentages as of 1988, sources of information on guidelines development, and a cross-reference chart of the child support provisions of the Family Support Act of 1988. (JB)

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Turning Promises Into Realities: A Guide to Implementing the Child Support Provisions of the Family Support Act of 1988

Second Edition

by

Paula Roberts

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Turning Promises Into Realities: A Guide to Implementing the Child Support Provisions of the Family Support Act of 1988

Second Edition

Paula Roberts
Center for Law And Social Policy

October, 1991

The Center for Law And Social Policy (CLASP), founded in 1969, is fostering progressive policies that serve the interests of low-income families and dedicated to preserving a vibrant network of legal services programs throughout the nation.

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CHAPTER 1 – INTRODUCTION

Quietly – almost without notice – Congress has altered the nature of America's family law system.

For over 200 years it was a given that American family law was to be defined by the states: the federal government had no business in this area. Then, in 1974, Congress added Title IV-D to the Social Security Act. As a result of this law, all states now have a publicly-funded child support enforcement program to help locate absent parents, establish paternity, obtain and periodically modify support orders, and enforce those orders. (These systems will be referred to as "state IV-D systems.")

In 1984, Congress went even further. It required states to enact a variety of specific laws which apply not just to those using the state IV-D systems but to everyone.

In 1988, Congress went further still. Under Title I of the Family Support Act ("FSA"), the states are required to again amend their family laws so that in every state:

- Parents must furnish their Social Security numbers to the state's birth records agency as part of the process involved in the issuance of a birth certificate.
- If paternity is contested, all parties must be required to submit to genetic testing.
- Decisionmakers must use the state's child support guidelines in establishing or modifying support awards unless to do so would be unjust or inappropriate.
- New child support orders must provide for collection through immediate wage withholding unless both parties agree to an alternate arrangement or there is a finding of good cause.

As a result, state legislators, judges, advisory boards, administrative agency personnel, and parents' groups are now involved in making decisions and/or offering recommendations on how major changes should be implemented at the state level. This manual is designed to help those interested persons make good choices.

Based on the states' own experience, this manual suggests law and policy changes which meet the new federal requirements as well as some which go beyond those requirements to achieve better results.

The recommendations offered in this book are based on four fundamental assumptions about what characterizes a good state child support enforcement system. They are:

- As much as possible, the basic state family law system is the same for everyone. The same set of laws apply to those using the IV-D system and those using private attorneys.
- There is an effective and efficient IV-D agency capable of assisting all those who ask for help in enforcing the state's laws. The agency is

staffed adequately so that it delivers services in a timely manner, and is sufficiently funded so that it can take advantage of new technologies.

- Child support guidelines that reflect concern for the needs of children have been adopted.

- Immediate income withholding is the primary means of enforcing orders against wage earners. A variety of other mechanisms are available to reach the self-employed.

- The system tries to equitably balance the needs and interests of custodial parents, noncustodial parents, children, and (in some cases) the state. The primary concern, however, is the best interests of the children.

Such a system is achievable. Chapters 2-8 describe how to bring it about.

Such a system would have a tremendous positive impact on families headed by women. In the last 20 years, as divorce rates have soared and childbirth outside marriage has become more common, poverty among such families has become widespread. Lacking access to affordable legal services to establish paternity or obtain an enforceable support order, many mothers have become the sole support of themselves and their children. They face a labor market which generally offers low-paying employment. They also face the costs of child care and health care, benefits not often available through their jobs. As a result, many of these families live near or below poverty.

Recent data about the noncustodial parents of such families reveals how inequitable this situation is. For example, one state study found that more than 70 percent of noncustodial parents had incomes over twice the poverty line. Another study found that in the 21-29 age cohort, 59 percent of divorced or separated mothers were poor but only 12 percent of noncustodial, divorced or separated fathers were; 60 percent of never-married mothers were poor, but only 25 percent of never-married fathers fell into poverty.

The benefit of increasing noncustodial parents' obligations, however, would not be as great for children in families receiving AFDC. In those families, evidence suggests that while noncustodial fathers could pay something, their ability is considerably less than that of the general population of noncustodial fathers.

For those families something more than just better support enforcement is necessary. Chapters 9 and 10 suggest a number of strategies states could use – building on a base of better support enforcement – to alleviate poverty in AFDC families.

The bedrock of any change, however, is establishing an effective IV-D system. So that is where we shall begin.

CHAPTER 2 – THE STATE'S CHILD SUPPORT PROGRAM: TIME FRAMES, STAFFING, AUTOMATION

AN OVERVIEW

Federal law requires states which participate in the AFDC program to have a child support enforcement program which complies with Title IV-D of the Social Security Act. These child support enforcement programs (hereafter referred to as "state IV-D programs") are supposed to locate absent parents, establish paternity (if necessary), obtain and periodically modify support orders, and enforce those orders.

Recipients of AFDC receive services automatically and free of charge. (These families will be referred to as "AFDC IV-D" families throughout this book). Families which receive Medicaid are also entitled to receive services without filing an application or paying fees. (Those families will be referred to herein as "Medicaid-only" families.) Families leaving AFDC receive services without filing an application or paying a fee, but may be asked to pay for some specific services. (These will be referred to as "post-AFDC" families.)

Others needing help can file an application with the state IV-D agency. They may pay an application fee and be asked to pay fees for specific services. So long as they pay whatever fee is required, they are entitled to services. (These families will be referred to as "non-AFDC IV-D.")

Participating states submit a state plan to OCSE demonstrating compliance in 23 different areas. The federal government then pays 66 percent of the basic cost of running the IV-D program. So long as they are current in their reports, states receive this money in advance (based on estimates) on a quarterly basis.

States are now required to computerize their basic information systems. The federal government will pay 90 percent of the cost of planning, designing, developing, installing or enhancing Automated Data Processing (ADP) systems which meet federal requirements.

In addition, states receive incentive payments for collecting support. Depending on the state's efficiency, these payments can range from 6 to 10 percent of the amount collected. There is no limit on the amount of the incentive payment a state can receive for AFDC IV-D cases. There is a limit or "cap" on the incentive payment a state can receive for other cases, however. The total non-AFDC, post-AFDC and Medicaid-only incentive payment cannot exceed 115 percent of the AFDC incentive payment.

States also retain a portion of the support paid in AFDC cases to reimburse themselves for AFDC paid to the family.

In short, states with efficient and effective IV-D systems can actually make money. Despite the fiscal incentives, however, recent reports by the Government Accounting Office, the Office of the Inspector General and the House Committee on Ways and Means all indicate that few states actually do run effective systems. (See Appendix A for a recent ranking of the states in this regard.)

At the federal level, responsibility for Title IV-D of the Social Security Act lies with the Department of Health and Human Services (HHS). Within HHS, responsibility is delegated to the Administration for Children and Families. Within this agency, is the Office of Child Support Enforcement (OCSE). OCSE is

the entity states deal with when they have questions about their program. Generally, this is done by contacting the OCSE regional staff working in the HHS Regional Offices.

Federal law gives the Secretary of HHS responsibility for 1) establishing standards for judging the overall effectiveness of state IV-D programs; 2) establishing minimal organizational and staffing standards for state IV-D agencies; 3) reviewing and approving the states' IV-D plans; 4) conducting audits of state IV-D programs; and 5) providing technical assistance to the states.

HHS also maintains national records of IV-D collections, assists the states in maintaining their records, and issues an annual report to Congress. It operates the Federal Parent Locate Service, which assists states to track down absent parents, and refers cases to the Internal Revenue Service for tax refund intercept. Finally, HHS is responsible for assisting states in developing plans for their Automated Data Processing Systems and approving plans which meet federal criteria.

If a state's IV-D plan does not meet federal requirements, HHS should refuse to give the state any federal funds. If a state has an approved plan, but is not in substantial compliance with that plan, HHS is required to impose a sanction. The sanction is a reduction of from 1 to 5 percent in the state's AFDC reimbursement.

Like the states, HHS has not received favorable ratings for its performance. For example, a recent Congressional report (relying on evaluations by state IV-D agencies) gave it an overall "C." (See Appendix B for a summary of the criticisms.)

CHANGES IN FEDERAL LAW

The Family Support Act reflects Congressional desire to improve the functioning of both the state and federal agencies. For the states, there are a few incentives to improve. But the thrust of the FSA is to require HHS to impose sanctions on those whose systems are not functioning properly.

Of general interest are the following provisions:

- **Getting Serious About Paternity Establishment.** Starting in 1991, there are FSA standards on how many paternities a state must establish in order to be in substantial compliance with its IV-D obligations. If a state does not meet these standards, fiscal sanctions will be imposed. (This is discussed more fully in Chapter 4.)

- **Improving the Parent Locate Service.** The Federal Parent Locate Service does not have access to some important data bases. The FSA partly addresses this by granting access to state wage and unemployment compensation claims information maintained by State Employment Security Agencies (SESA).

- **Developing a Plan to Improve Interstate Enforcement.** Poor interstate support enforcement is a serious problem. The FSA established a 15-member Commission to define and address the issues. The Commission will submit a report to Congress in early 1992 on what legislative changes are needed to improve interstate enforcement.

- **Upgrading Information.** It is difficult to develop child support guidelines without knowing what it actually costs to raise a child. The FSA authorized

a study on the costs of raising children in two-parent, one-parent post-divorce, and one-parent never-married families. The results have now been published.

• **Establishing Time Frames for IV-D Services.** The FSA required HHS to develop regulations setting time frames within which state IV-D agencies must respond to requests for locating absent parents, establishing paternity, obtaining a support award, and enforcing an award. These regulations became effective October 1, 1990 and require states to provide services much more quickly than they have in the past. (This is discussed more fully in the chapters following.)

• **Setting Time Frames for Distribution of Support Collections.** The FSA also required HHS to develop time frames within which state IV-D agencies must distribute the support they collect. These regulations were developed simultaneously with and became effective the same time as the regulations governing the time frames for providing IV-D services. (This is discussed more fully in Chapter 7.)

• **Reporting Data to HHS.** There is concern about the quality of data available to HHS on the state's actual performance under Title IV-D. The FSA requires HHS to collect data not just on services requested, but on the number of cases in which service was actually provided. Thus, HHS will be able to see for both AFDC and non-AFDC families how many cases actually had paternity established, had an absent parent located, obtained a support award, received modification services, or had an award enforced.

These changes will allow HHS to better evaluate whether a state is in "substantial compliance" with its IV-D obligations and make it easier to determine whether sanctions should be imposed.

The FSA also changed federal law in regard to Automated Data Processing systems. In the past, states had the option of developing such systems. Now, they are required to do so. Each state's plan for such a system must be submitted to HHS by October 1, 1991. The system must be statewide and must be operational by October 1, 1995.[1] Thus, states which have not yet automated will have to do so or face federal fiscal sanctions. Moreover, federal funding at the 90 percent level will be available only until September 30, 1995.

IMPLICATIONS FOR THE STATES

Access to IV-D Services

As part of the regulations governing time frames for IV-D services, HHS included new requirements on the provision of applications and client information packets. These regulations became effective October 1, 1990 and are found in 45 C.F.R. §303.2.

Under these regulations, non-AFDC families may apply for IV-D services by signing an application. Such applications must be readily accessible to the public. They must be given to anyone who requests an application in person on the date of the request. If the request is made by mail or phone, the application must be sent within five working days. The state must accept the application on the day it and any applicable fee are received.

The federal regulations define an application as a written document requesting IV-D services signed by the individual applying for services. Accompanying the

application must be information describing the available services, the individual's rights and responsibilities, and the state's fees, cost recovery, and distribution policies. This same information must be provided to AFDC IV-D and Medicaid-only families within five working days of their referral to the IV-D agency.

Several states have combined their non-AFDC IV-D application and their information packet into one document. In so doing, they have created needlessly complex and intimidating documents that do not meet federal requirements. They are also confusing to AFDC and Medicaid-only clients because some of the information does not apply to them. The application should be a simple request for services.

Moreover, if states take the time to develop well-written, easy to understand accompanying information packets for clients, they have the opportunity to establish better initial relationships, eliminate possible misunderstandings, and develop a better rapport with those using IV-D services.

Recommendation 1 – States should develop very simple application forms for non-AFDC families. Accompanying them (and provided separately to AFDC, Medicaid-only and post-AFDC families), there should be a packet of information which clearly and simply describes what services can be provided, how long various steps may take, what the client is expected to do, what fees and costs may be involved, and what to do if problems arise.

In addition, to reach as many families as possible, applications and information packets should be available in a variety of places where low-income custodial parents might have access to them.

Some states have chosen to supplement these information packets with telephone hotlines. This allows clients to call in and receive informational announcements as well as specific information about their own case 24 hours a day. Some systems can also record questions for referral to a caseworker. Washington, DC, for example, successfully operates such a system. Several software companies offer programs to assist states in implementing such a system.

Recommendation 2 – IV-D applications and information packets should be available at Food Stamp, unemployment insurance, Social Security and welfare offices as well as places such as child care centers. States should also consider installing a telephone system to supplement this written information.

These steps will be useful in reaching families **presently in need** of services. Many states, however, now believe that the best time to reach out – particularly in the area of enforcement of orders – is **before** the need arises. They offer collection and enforcement services at the point a support order is entered or modified. Some systems are exclusively IV-D, some are primarily IV-D but allow others to opt in, while still others are nearly universal. For different approaches to systems see Iowa Code §252B.13A (IV-D cases only pay to a collection service center); Ore. Rev. Stat. §25.320 (IV-D and others can opt in for payments to clerk of court); Fla. Stat. §61.13(1)(D) (unless both parties request and court finds it in best interest of child, all payments made to clerk of

court in county where court is located). Virginia also encourages payment to the Department of Social Services in most cases. VA Code Ann. §20-60.5.

The most universal system is operated in Ohio: all new or modified support orders are paid through the county child support enforcement agency, Ohio Rev. Code §2301.36(A). Obligees of existing orders can also apply to this agency for collection services, id §2301.36(E). That agency, which by law is the county IV-D agency, monitors compliance, and, if the order falls more than 10 days in default, notifies the court, id §2301.37. The court then begins enforcement. Under Ohio law all orders monitored by the IV-D agency are deemed to be IV-D cases and the obligee is deemed to have filed a signed application for services.

Thus, at the point any new order is entered, the case becomes a IV-D case and monitoring of collection/referral for enforcement (if needed) begins. One difficulty with this approach is that it appears to violate federal law and regulations as to the need for a written application.

> **Recommendation 3** – States should give strong consideration to adopting a policy of making IV-D services available every time a support order is entered or modified. The offer should be made by the clerk of the court or other appropriate official and be accompanied by the simple IV-D application and information packet described above.

Therefore, states contemplating this delinquency monitoring approach should provide actual applications to those in the system. See VA. Code Ann. §20-60.5.

Another possible approach is to set up a central state registry of all support orders. This registry could collect and disburse all payments. See, e.g., 23 Pa. Stat. Ann. §4325. Thus, there would be collection records available in all cases – IV-D as well as non-IV-D. If a non-IV-D family later wished to join the IV-D system, all the basic records would be available.

Time Frames for Providing IV-D Services

On October 1, 1990 federal regulations governing states' obligations to provide IV-D services within a reasonable period of time became effective, 45 C.F.R. Part 303.

- Once an application is filed, the IV-D agency must open a case file, solicit information, refer for locate services and begin to document actions taken within twenty days.

- If location services are needed, the appropriate locate actions must be taken and completed within seventy-five days. Once the absent parent is located, if paternity establishment is needed, within ninety calendar days the state must either file for paternity or complete service of process to establish paternity.

- If an order needs to be established, within ninety days of establishing paternity or locating an absent parent who does not need paternity established, the IV-D agency must obtain a voluntary support order or complete service of process necessary to commence proceedings to establish an order.

- Once a support order has been established, the IV-D agency must have a system to monitor compli-

ance, identify noncompliance, and initiate income withholding and, within thirty days, take any other appropriate enforcement action.

- In each case, if the required action is not successful, the IV-D agency must try again. Parent locate attempts must be repeated at least quarterly for at least three years. If support is not established or enforcement is not successful, the agency must determine why the attempt failed and when it would be appropriate to try again.

Many states have caseloads per worker in the hundreds and even thousands. Workers with caseloads this high will not likely be able to meet the new time frame requirements.

How many staff are actually needed will vary from state-to-state. It will depend on caseload size, degree of automation, number of actors involved (e.g., court clerks, local or county IV-D agencies) and the types of cases included in the worker's caseload. For example, a fully automated state system where the primary demand is for enforcement services needs a different level and kind of staff than a system which is county run, nonautomated, and has a high demand for paternity services. States will also have to look at the staffing issue in light of the backlog of cases on which services need to be provided. In addition, states will have to project how many new non-AFDC custodians will be motivated to apply for IV-D services in order to quickly access new remedies such as immediate income withholding. (This remedy is discussed more fully in Chapter 6.)

New and existing staff will also have to be oriented to the revised law and trained about their responsibilities under it.

There are experts available to assist state agencies in developing good staffing patterns and using their services would be well advised. Experts may also be helpful in developing manuals for new employees and providing training to them. Free assistance for identifying experts who could be helpful in these areas is available from the Child Support Technology Transfer Project which is administered by the Center for Support of Children, 5315 Nebraska Avenue, NW, Washington, DC 20015, (202) 363-5923.

Recommendation 4 – State agencies should evaluate their current worker-caseload ratios for support staff, investigators, attorneys, process servers, etc. They should then estimate how many of each are actually needed to run a system which meets federal requirements and how much training will need to be provided to both new and old employees. The agencies' budget requests should include funding for these new staff and for training of all staff.

Automation

Most states are now in the process of developing an automation plan. Even states with an already approved system will have to submit plan revisions to meet the FSA requirements. Unfortunately, federal regulations on the requirements were not issued until May 1991, and then only in proposed form. States, thus, have to submit plans by October 1, 1991, without final regulations to guide them. Nonetheless, at least the following can be said. A good ADP system should be able to:

- open a case immediately;

• maintain and periodically verify name, Social Security number, date of birth, home address, and mailing address of custodial and noncustodial parents using the IV-D system;

• document activity or activities undertaken to locate, establish paternity, and obtain, modify or enforce an order;

• interface with other state computers (e.g., AFDC, foster care, labor records, birth records, bureau of motor vehicles information) and obtain information necessary for support enforcement from these records;

• prioritize the case under state criteria;

• issue automatic ticklers and notices (e.g., 30 days arrears have accumulated, modification of order needed);

• allocate collections to cases, credit them and authorize distribution to the custodian and/or the AFDC or Medicaid agency;

• maintain records necessary to meet federal audit and data reporting requirements; and

• interface with other states' computer systems.

HHS will review the state's ADP plans and inform them by July 1, 1992 whether they are acceptable. States then have until October 1995 to implement their system. Failure to submit an approvable plan and/or failure to implement the plan by October 1, 1995 subjects the state to a complete loss of IV-D and AFDC funds. The exact details of what an ADP system should look like are available from OCSE in a document titled *Automated Systems for Child Support Enforcement: A Guide for States.*

Recommendation 5 – State legislatures should pass enabling legislation so that sufficient resources are devoted to implementing an ADP system reflective of state needs. Such legislation should authorize courts, agencies, etc., to feed necessary data into the system and contain provisions to protect against unauthorized use of the data.

Recommendation 6 – Legislatures must allocate sufficient funds to carry out the ADP plan. Funds will have to be available to purchase sufficient hardware and software so that state and local staff will be able to use the system. Money for training will be necessary.

In developing their ADP systems, states must also keep in mind that OCSE is going forward with a telecommunications system called CSENet. Through this system, micro or minicomputers will connect the main child support offices in each state to the federal General Services Administration's FTS 2000 data lines. Local IV-D agencies will be able to call toll-free and access information from other states IV-D files. This should make handling interstate cases much easier. However, states now developing their own ADP systems should be sure that what they propose will interface with CSENet.

Obtaining the Funds

FSA makes it necessary for state legislatures to allocate more funds to the IV-D

program. Much of this money will go to increase staffing and to automate. States need to remember that the bulk of the new money will come from the federal government. Federal reimbursement (at 66 percent) will be available for staff: 90 percent reimbursement is available for ADP. Moreover, increased collections from a better staffed, automated system will lead to increased federal incentive payments, as well as increased reimbursement for AFDC paid out.

Thus, implementing the FSA will not be costly to the states in the long run. An increase in state funds in the short run, however, will be necessary. Failure to recognize this could lead a state to suffer a significant fiscal penalty as HHS becomes more serious about sanctioning states which perform poorly.

For example, if a state fails to meet its paternity establishment percentage, this will constitute lack of substantial compliance with the state's IV-D obligations. At that point, a penalty of not less than 1 or more than 2 percent of the state's federal **AFDC reimbursement** for that quarter and for subsequent quarters can be withheld. This penalty will be lifted only when the state meets its paternity establishment percentage for a subsequent full quarter. A second failure to comply subjects the state to a penalty of not less than 2 or more than 3 percent of its AFDC reimbursement, and third failure raises the penalty to not less than 3 nor more than 5 percent.[2] Thus, states need to take their responsibilities seriously.

A good source of funding is available. States receive incentive payments for cases in which a collection is made. This money usually goes back into the general state treasury.

These funds could be earmarked for improving the IV-D system. Utah has done this for ten years. Massachusetts has recently done this and found that it increases worker morale in addition to improving agency performance. Texas, which has recently been recognized as the most improved program in the country, did so by reinvesting all of its incentive payments back into the IV-D program. This action alone tripled the program's budget, allowing it to double both its staff and the number of its field offices.

Recommendation 7 – State legislatures should earmark incentive payments to fund improvements in the IV-D system. This money should be in addition to – not a replacement of – money already allocated by the legislature for the IV-D program.

A properly funded, adequately staffed and automated system will enable states to meet their federal IV-D obligations. It will also enable them to provide significant assistance to low- and moderate-income single parents and help alleviate some of the economic hardships these parents face. With such a framework in place, states will also be able to carry out the specific functions discussed in the next five chapters.

AN OVERVIEW

Before any action can be taken, many custodial parents need to find the noncustodial parent. Since 1975, there has been a Federal Parent Locate Service (FPLS) to assist in this process. In addition, states are required to have their own Parent Locate Systems (PLS) which must be able to access all relevant sources of state information. This includes public assistance agencies, the income tax bureau, motor vehicle agencies, unemployment compensation records, criminal records, as well as employers, the telephone company, the postal service, unions and fraternal organizations.

Until recently, there were no time limits for referral from the IV-D agency to the state PLS, for referral from the state PLS to the FPLS or for referral from one state's PLS to another state's PLS. There was also no federal guidance on when to review cases in which the parent was not located on the first try.

CHANGES IN FEDERAL LAW

As noted in Chapter 2, the FSA required HHS to issue time frames for various state IV-D agency activities. This includes time frames for conducting an initial parent locate and standards for periodic review when a parent is not initially found. Regulations implementing this requirement became effective October 1, 1990 and are found at 45 C.F.R. §303.3.

Pursuant to these regulations, once it is determined that location services are necessary, all appropriate sources – including the FPLS – must be used within 75 calendar days. If the first attempt is unsuccessful, the IV-D agency must try again whenever new information becomes available. If new information is not available, the agency must at least search automated sources on a quarterly basis for the next three years. Moreover, the case must be submitted to the FPLS at least once a year. After three years of unsuccessful attempts, the case may be closed.

The FSA also required the Secretary of Labor to enter into an agreement with the Secretary of HHS to provide the FPLS access to wage and unemployment compensation claims information and data maintained by or for the Department of Labor or state employment security agencies. This agreement has been entered into and public notice given, 55 *Fed. Reg.* 34769 (Aug. 24, 1990). State agencies administering unemployment compensation programs must take the necessary steps to insure that the FPLS can obtain prompt access to any state wage and unemployment compensation claim information that might be useful in locating absent parents and/or their employers. Failure to meet this requirement results in the cessation of all federal funds for unemployment insurance.

Finally, the FSA required states to obtain the Social Security numbers of both parents as part of the general process of obtaining birth records information.

IMPLICATIONS FOR THE STATE

Parent Locate in General

In addition to time frames, the federal regulations add new detail to the scope of the parent locate task. **First**, it is clearly spelled out that parent locate is not just to

obtain a home address or place of employment: it must also obtain information about the noncustodial parent's assets. Thus, if a noncustodial parent appears to be unemployed, the parent locate should not stop – it should seek to find any property or bank account which could be subject to a lien or attachment. **Second**, the regulations list a broad spectrum of sources which the state parent locate system should use. They include interstate networks; the FPLS; local officials and employees administering public assistance, general assistance, medical assistance, food stamps and social services; relatives and friends; current or past employers; the telephone company; the U.S. Postal Service; financial references; unions; fraternal organizations; police, parole and probation records; and state agencies administering wages, unemployment insurance, income taxation; drivers licenses and vehicle registration. Moreover, the state parent locate service is to have working relationships with the appropriate agencies so that it can effectively utilize these locate resources.

(*continued next column*)

Recommendation 8: State IV-D agencies should review their parent locate systems. This review should ask: (1) whether all the data sources available to the parent locate system are actually being used; (2) the degree to which computerized data bases in the state are able to interface with the Parent Locate System; (3) the time it takes to access other data bases; (4) whether cases are being processed in a timely manner; and (5) what procedures are used to attempt a quarterly relocate if the original effort was unsuccessful.

If review indicates that adjustments are needed, this should be done. This process should be integrated into the state ADP plan and CSENet development (see Chapter 2) to insure compatibility with and speedy access to all relevant databases.

Recommendation 9: State IV-D agencies should develop protocols for periodic review when an initial parent locate is unsuccessful. A state search should be conducted anytime new information becomes available or at least quarterly for the first three years after an unsuccessful search even if no new information is available. In addition, cases should be submitted to the FPLS at least yearly.

Use of State Wage/Unemployment Data

As noted above, state unemployment compensation agencies must give access to certain information to the Parent Locate Service.

> **Recommendation 10**: State law should grant to the unemployment insurance agency the authority to make state wage and unemployment compensation claim information available to the federal Parent Locate Service. Appropriate privacy protections should be included in this authorization.

Social Security Numbers and Birth Certificates

The FSA requires states to collect the Social Security numbers of both parents as part of the process of issuing birth certificates. The numbers are not to appear on birth certificates, but are to be made available to the state's IV-D agency upon request. Under limited circumstances (which were to be specified in regulations issued by HHS), states are allowed to exempt some persons from this requirement for "good cause."

Rather than issuing regulations, OCSE issued an Action Transmittal (OCSE-AT-90-04) which provides the following guidance to states:

> (a) General. In the administration of any law involving the official birth registration process, each State vital statistics office, or other agency having administrative responsibility for the law involved, must require each parent to furnish to such office or agency, the SSN (or numbers, if the parent has more than one such number) issues to the parent, unless a determination of good cause for not providing such number(s) is made. A parent need not be required to disclose his or her SSN(s) if the parent has good cause, as defined by the State, for not providing such number(s) based on evidence provided by the parent. We are not issuing regulations at this time because we believe the States are in the best position to determine good cause circumstances. However, States may wish to limit good cause circumstances to those under which:
>
> (1) The child was conceived as a result of incest or forcible rape; or
>
> (2) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction.
>
> (b) Maintenance of Social Security Numbers. The State vital statistics office or other appropriate agency may not display SSN(s) on the portion of the birth certificate issued upon request. The SSN must be printed on the portion of the birth certificate which remains in the official birth records and is not released. The State vital statistics office or other appropriate agency may establish a system for maintaining SSN(s) collected in accordance with paragraph (a). The State vital statistics office or other appropriate agency is not required to keep a separate system of records – it can be added to the existing vital statistics system.

(c) Availability of Social Security Numbers. The State vital statistics office or other appropriate agency must make SSN(s) available to the agency administering the State's plan for child support enforcement under Title IV-D of the Social Security Act in accordance with Federal or State law and regulation. Federal funding is available at the applicable matching rate for the establishment of, and costs associated with, all necessary agreements between State vital statistics offices and IV-D agencies to request and transfer SSNs.

(d) Use of Social Security Numbers. A State may not use any SSN, obtained by the State vital statistics office or other appropriate agency during the birth registration process, for any purpose other than locating absent parents, establishing paternity, and establishing and enforcing support orders, unless section 7(a) of the Privacy Act of 1974 authorizes the State to disclose such numbers because the State adopted before January 1, 1975, a statute or regulation requiring such disclosure. Although the statute only mentions enforcement of support orders, we believe that Congress intended to allow disclosure for the purposes of locating absent parents, and establishing paternity and support orders because these actions are essential to, and prerequisites of, enforcement of support obligations. We believe this is consistent with Congressional intent stated in Conference Report 100-998, on pages 107-108: "The conference agreement follows the Senate amendment modified to provide that the parents' SSN shall not appear on the birth certificate, and that the use of the SSN obtained through the birth record would be limited to Child Support Enforcement (CSE) program purposes . . ." (emphasis added).

Since this Action Transmittal was not issued until May 4, 1990, many states did not have the opportunity to review it before enacting state legislation. Others have not enacted such legislation since they lacked any guidance. Thus, some states will need to review what they have done while others will need to draft new legislation.

In this regard, the most crucial issue will be defining "good cause" for not obtaining the number. Despite statutory language to the contrary, HHS has left such definition up to the states. It suggests, but by no means requires, that good cause be narrowly defined.

Common sense would argue for a broader, but nonetheless carefully designed definition. For example, Washington requires Social Security information be provided only when the parents are married or the father has signed an acknowledgement of paternity, Wash. Rev. Stat. 70.58.080(1). In addition, aliens who do not have Social Security numbers might have good cause for not furnishing them, or persons with religious objections to obtaining a Social Security number might be exempt.

Moreover, there are some particular problems which arise when obtaining Social Security numbers from the alleged fathers of nonmarital children.

If a child is born outside marriage, her/his father may not acknowledge paternity or appear at the hospital/birthing facility. Thus, it may be impossible to obtain the information. Even if the father

is around, he may be unwilling to admit paternity because of possible criminal implications (e.g., violation of state fornication or statutory rape laws). Moreover, in some states, birth records agencies will not obtain a father's name for the birth certificate because the name cannot be entered until a court has made a finding of paternity. It would be odd to require disclosure from a putative father of his Social Security number but not his name.

Recommendation 11: States should, as part of the birth records process, require Social Security number disclosure only from the parents of marital children and children whose parents have voluntarily acknowledged paternity. State law should then require courts to obtain the Social Security numbers of the parents in contested paternity cases at the time paternity is established, and to supply those numbers to the birth records agency. Appropriate privacy protections should be built into the statute. Exemptions should be provided to those who do not have a number, those having a religious basis for failing to obtain a number, and in cases where the child was conceived as a result of rape or incest and where the child is being placed for adoption.

Moreover, if, for whatever reason, a parent refuses or fails to provide the number, the question of **penalty** must be addressed. In other contexts, the state simply withholds the benefit (e.g., driver's license, public assistance) for which the noncooperating person has applied. But here the benefit – a birth certificate – inures to the child who her/himself has not refused to disclose the number. If a state withheld the certificate, it could be sued for damages. See, DeLeiris v. Scott, 642 F.Supp. 1552 (D.R.I. 1986).

Recommendation 12: State law should make it clear that a parent's failure to provide a Social Security number cannot be grounds for refusing to issue a birth certificate to a child.

Other Social Security Number Issues

States should take the time to review cases in their system to find missing Social Security numbers or correct errors. Illinois recently conducted a project (SSN Search) to do this and thereby found numbers for or corrected errors in almost half the cases reviewed. As a result of reviewing those cases and attempting to find SSNs, almost $2.5 million is now potentially collectible.

To find a SSN for an absent parent, there are three potential sources: 1) the custodial parent who may have old tax returns, house deeds, automobile title documents and the like which contain the number; 2) the state parent locate services which may access records kept by Social Security number (e.g., drivers license); and 3) the FPLS. The FPLS can access IRS and Social Security Administration (SSA) records. For IRS, the noncustodial parent's name and the custodial parent's SSN are all that is needed. To the SSA, states must provide the noncustodial parent's name, approximate date of birth and place of birth, maiden name of his/her mother or father. SSA can also verify whether a SSN is correct.

Once an noncustodial parent is located, the custodian may next need to establish paternity. The FSA will have a substantial impact in this area.

AN OVERVIEW

In the past 20 years, increasing numbers of women have given birth to children outside of marriage. Indeed, in 1988, 26 percent of births in America were to unmarried mothers.

There is strong correlation between childbearing outside of marriage and poverty. Many poor mothers struggle along at low-paying jobs while others apply for AFDC. In either case, they and their children subsist in poverty. These mothers and children would greatly benefit if their wages or AFDC grant could be supplemented by regular child support payments. Children would also benefit in a number of non-economic ways. Before this can happen, however, paternity must be established.

In the past, low-income mothers have not had access to efficient and effective paternity establishment services. Private attorneys to pursue these cases are expensive. State IV-D agencies, which are supposed to provide paternity establishment services, have not generally done a good job.

Critics have identified three reasons for this failure. **First**, the financial structure of the federal law described in Chapter 2 discourages states from pursuing paternity actions. If paternity has already been established, the state need only seek a support order. This may be done administratively, and 66 percent of the full cost will be reimbursed by the federal government. If, on the other hand, paternity needs to be established, court costs, genetic testing or expert witness fees may be involved. Some of these costs will be reimbursed at 66 percent, but not all will be. (Judges' salaries, for example, are not reimbursed.) Moreover, establishing paternity does not necessarily lead to a support order. If support is not ordered or collected, a state receives no incentive payment. Thus, states feel that they pay out more (in costs) and receive less (in incentives) when they pursue cases involving contested paternity.

Second, many low-income parents do not understand the benefits of establishing paternity. Thus, they do not press the IV-D agency to pursue their cases. Without pressure, an overworked agency simply fails to act.

Third, the paternity establishment process itself is too cumbersome. In most states, parenting a child outside marriage still has semi-criminal overtones. The states' laws reflect this by making the process too complex and difficult.

Some or all of these explanations may be valid. In the Family Support Act, Congress accepted all three and made changes designed to improve paternity establishment accordingly.

CHANGES IN FEDERAL LAW

As noted in Chapter 2, the FSA required the Secretary of the HHS to issue regulations setting time frames within which state IV-D agencies must accept applications and respond to requests for paternity services. Under these regulations, state agencies must file a paternity action within 90 days of locating the alleged father. They must establish paternity (or exclude the possibility) within one year thereafter. 45 C.F.R. §303.5.

In addition, the federal reimbursement rate for the costs of genetic tests in contested paternity cases have been increased to 90 percent. This is the federal carrot. The law also contains a stick: states must meet numeric goals for establishing paternity in IV-D cases needing this service. If they do not, then their federal reimbursement for AFDC will be reduced. (See discussion in Chapter 2.)

In determining a state's numeric goal, each year HHS computes a **national paternity establishment percentage**. This percentage is the number of children born outside marriage receiving IV-D services for whom paternity has been established divided by the total number of children born outside marriage receiving IV-D services. (Children whose alleged father is dead and those for whom an AFDC "good cause" exemption have been granted will not be counted in determining this percentage.) The same formula is used to determine the **state paternity** establishment percentage each year by using the comparable state data.

To meet its obligations, the IV-D agency must have a state paternity establishment percentage which is 1) equal to or greater than 50 percent; 2) equal to or greater than the national paternity establishment percentage described above; or 3) the state's paternity establishment percentage for fiscal year 1988, increased by three percent per year for every year thereafter.[3] The 1988 baseline figures are listed in Appendix C. From these figures it appears that 21 states have paternity establishment percentages of less than the national average and will have to improve performance accordingly.

Other relevant provisions of the FSA require states to:

- notify AFDC recipients of the benefits of establishing paternity and that the IV-D agency provides this service.

- allow children on whose behalf paternity actions had been brought but were dismissed for statute of limitations reasons under a statute of less than 18 years to refile their suits at any time prior to their 18th birthdays.

- have laws which require all parties to a contested paternity case to submit to genetic tests.

- consider implementing simple procedures for establishing paternity in noncontested cases and having civil procedures available for handling contested cases.

IMPLICATIONS FOR THE STATES

Funding Paternity Services

The paternity provisions of the Family Support Act will have a direct fiscal impact on the states. Immediately, there is a substantial increase in the amount of federal funding available to offset the cost of genetic testing.

In some states, the money saved under this provision, will offset the cost of the provisions of the FSA relating to time frames for providing services and meeting the state paternity establishment percentage: in most it will not. In order to avoid the AFDC fiscal sanctions envisioned by the law for states which do not meet their paternity obligations, states should evaluate the fiscal impact now.

Recommendation 13: State IV-D agencies should evaluate the number of personnel (especially legal personnel such as attorneys and judges) available to handle paternity cases and request an appropriation sufficient to increase that number if necessary. State IV-D agencies should also be sure that they have requested sufficient state monies to cover the state's portion of the cost of genetic tests for all IV-D contested paternity cases and for counsel to indigent putative fathers. (See Recommendations 14 and 18 below.)

Outreach on the Value of Establishing Paternity

From the child's point of view, there are both economic and noneconomic benefits to be derived from establishing paternity. On the **economic** side, the obvious benefit is that the child might receive regular child support payments. In addition, the following benefits might (now or in the future) be available to a child for whom paternity has been established:

- Social Security. When a father has been employed and contributed to the Social Security system, if the father dies or becomes disabled, his child is entitled to receive benefits until age 18.

- Military Allotments. A father in the armed services may draw an extra allowance (BAQ) to provide a household for his dependents. For enlisted personnel in 1991, this allowance ranged from $289 to $528.90 per month. The child is also eligible for commissary and post-exchange privileges as well as military health care and insurance.

- Worker's Compensation. Children are eligible for dependents' benefits under this program so long as paternity is established.

- Health Insurance. If a father's employer-provided health care plan covers marital children, then benefits must be available to nonmarital children. If the father is in the military, the child can be covered by CHAMPUS.

- Inheritance Rights. Children whose paternity has been acknowledged have inheritance rights if their father dies.

On the **noneconomic** side, there are also important benefits. A child gains medical history and genetic information which may be critical in current or future medical treatment. The child may also develop family ties to grandparents, aunts, uncles, cousins, etc., as well as to her/his biological father. There is also evidence of the psychological value of simply knowing who your father is.

These benefits are not always apparent to the mother and alleged father. They may be unaware of the value to the child of establishing paternity. States could use the authority of 42 U.S.C. §602(a)(44) to develop and disseminate materials to explain these benefits to AFDC applicants and recipients.

While this is a necessary step, it is probably not sufficient. Most mothers of nonmarital children are not AFDC recipients. Even if they eventually use the AFDC program, they may not do so until many years after the child's birth. Yet, it

is at the time of the birth that the mother is most likely to know the father's address and place of employment. It is also at this time she is most likely to obtain an acknowledgment from the father or prove her case if he contests. Thus, it would be better for the state to conduct an information campaign – through the birth records agency – for the parents of all newborn, nonmarital children.

Washington has adopted a policy which might be a model for other states in this regard (Wash. Rev. Code §70.58.080). Both parents are given information by the physician, midwife or hospital on the advantages of paternity establishment. If agreeable, they are then given an affidavit to sign. The affidavit says the mother agrees to the establishment of paternity and that this is the father. The father then states he is the father. The affidavit is notarized. The affidavit and birth certificate (with both parents Social Security numbers) are filed with the office of vital statistics. If the child is receiving AFDC or Medicaid or if the mother applies for IV-D services, the IV-D agency will then seek a support order. Virginia has started a similar Paternity Establishment Project: Texas and West Virginia are also using this approach in pilot projects.

Federal matching funds are available for IV-D publicity and outreach campaigns as well as in-hospital procedures. Thus, there is a relatively inexpensive way for states to generate interest in establishing paternity and meet or exceed their state paternity establishment percentage described above.

Recommendation 14: State IV-D agencies should undertake a three-part strategy for making mothers and fathers of nonmarital children aware of the benefits of paternity establishment. **First**, the IV-D agency should prepare a simple pamphlet, available in appropriate languages, for all new parents of nonmarital children explaining the benefits of establishing paternity, the procedures for doing so, that IV-D services are available and how to access these services. Hospitals and other birthing facilities which normally collect birth records information should distribute these pamphlets to parents and be able to counsel interested parents in how to establish paternity and how to contact the IV-D agency for help. **Second**, public service announcements and other media devices should be developed to publicize the advantages of paternity establishment to the general community. Again, how to establish paternity and obtain IV-D services to help should be included. **Third**, specific outreach and counseling for AFDC mothers should be conducted as required by the FSA.

There are some caveats, however, to efforts aimed at AFDC and Medicaid-only mothers. Chief among them is that it may not be in the best interests of a child to establish paternity. If the mother or child has been physically or emotionally battered, it may be better to eliminate any legal claim the batterer may assert to continued contact with the family. If the child was conceived as a result of rape or incest, establishing paternity is inadvisable. There are also situations where the mother may feel that establishing paternity is

not in the child's best interest. For example, if the father is involved in criminal activity, she may not want him to be able to take the child on visits. If some member of the father's family has abused the child, she will want to protect the child from any contact with that relative.

For this reason, federal law allows an AFDC or Medicaid-only custodian to invoke a "good cause" exemption from cooperating with the state in establishing paternity. Mothers do not always know this. Moreover, many states grant "good cause" exemptions in only the narrowest circumstances.

Thus, any outreach campaign to AFDC applicants and recipients should detail under what circumstances the mother has the right not to pursue paternity. An explanation of what the state considers "good cause" and how to invoke the exemption should be included in the outreach materials. Recently issued federal regulations require that this must be done and provide a model notice, 45 C.F.R. §232.40(b)(2).

State agencies may also want to evaluate their "good cause" criteria. Since cases falling in the "good cause" exemption category are not included in the paternity establishment percentage discussed above, a state could improve its chance of meeting its goal by adopting realistic criteria which allow custodians who do not feel that establishing paternity is in the child's best interest to invoke good cause.

Revising the States' Paternity Laws

Historically, paternity suits were criminal proceedings. Moreover, they were governed by short time periods within which suits could be brought (statutes of limitations), restrictive use of evidence, and archaic presumptions about the mother's veracity.

Four things have brought change in this area:

- the creation of the IV-D system brought the state directly into the civil paternity establishment process. Most state statutes now authorize the IV-D state agency to bring an action in its own name and/or in the name of the state and the mother or child.

- the United States Supreme Court, in a series of cases, struck down short statutes of limitation for bringing a paternity action. Actions can now be brought even when the children are in their late teens.

- many states enacted civil proceedings for establishing paternity.

- there have been enormous advances in scientific testing related to paternity. In the 1940s, the "blood test" had advanced sufficiently that state legislatures and courts begin feeling comfortable allowing test results into evidence if they **excluded** the alleged father from paternity. By the 1990s, sophisticated DNA fingerprinting test can yield probabilities of paternity in the 98-99 percent range.

While all states have IV-D agencies, not all have been liberal in expanding their statutes of limitations, developing civil processes for establishing paternity or using scientific tests. Under the FSA, this will change.

1. Statutes of Limitation. The Child Support Enforcement Amendments of 1984 required each state to assure that paternity could be pursed for any child who had not yet reached her/his 18th birthday. (States are free to set even longer periods and many have wisely chosen to do so.) The FSA clarifies the intent of this statute: the 18-year statute of limitations is to apply to every child, even one for whom a paternity suit was previously brought but dismissed because a shorter limitations period was then in effect.

In some states, this is already the law. See, e.g., Shaw v. Seward, 689 S.W.2d 37 (Ky. 1985) and Tenn. Code Ann. §36-2-103(b)(2). In other states, court decisions or statutory language forbid the refiling of paternity actions dismissed under an old, short statute, on the grounds that this would be unconstitutional. See, e.g., Doe v. Roe, 677 P.2d 468 (Hawaii 1984). In Clark v. Jeter, 486 U.S. 456 (1988), the Supreme Court stated that this issue was "ultimately a matter of state law." The Court's opinion also suggests – but does not hold – that most of the old shorter statutes of limitation were constitutionally suspect.[4]

Recommendation 15: States should clarify their paternity statutes of limitation to make sure that every child under the age of 18 (or older if state law allows) can bring a paternity action even if a suit was previously dismissed under a shorter statute of limitations.

In so doing, state legislatures might also want to consider the issue of retroactive child support orders. If a parent has deliberately evaded a paternity suit, then imposing an obligation for past support is reasonable and fair. However, if a father only learns of the child's existence ten years after her birth, claiming ten years back support seems unjust. Some states have addressed this by limiting back claims to a particular period, perhaps tied in to the old statute of limitations. For example, Kentucky limits a claim for back support to four years. Ky. Rev. Stat. 406.031(1). (Under previous law, the statute of limitations for bringing a paternity action in Kentucky was four years.)

Recommendation 16: The state legislature should enact some limitation on a father's financial liability for child support prior to the establishment of paternity. This limitation should not, however, apply to fathers who willfully evade a paternity action.

A related issue is the father's responsibility for reimbursing the state when the child has received AFDC. Consider what happens if the state fails to timely pursue paternity, pays AFDC, and ten years later files a paternity case against an indigent father. The father who did not know of the child's existence could face a claim for the entire 10 years of AFDC paid out. This is likely to be a much greater amount that he would have been ordered to pay as child support. (This issue is discussed more fully in Chapter 5.) The state has an incentive not to pursue support claims in a timely manner as it can wait and seek a larger amount in AFDC reimbursement instead. Such a practice is obviously not in the child's best interest.

Again, Kentucky has adopted an interesting approach. It requires the state agency to make its paternity claim within three months of the child going on AFDC. If the agency does not do so, the state can

only claim three months worth of reimbursement for AFDC. Ky. Rev. Stat. 205.792.

Recommendation 17: The state legislature should enact some limitation on a father's liability to the state for AFDC paid out prior to the establishment of paternity. In no case should liability for AFDC reimbursement begin until the father has received notice of the fact that he is the alleged father of a child receiving AFDC.

2. Genetic Tests

As noted above, many states require the parties to a contested paternity case to submit to genetic tests. These states then admit those tests into evidence. See, e.g., Cal. Civ. Code §§7000-718; Hi. Rev. Stat. §584-11 and 12.

The FSA required states to enact statutes, by November 1, 1989, under which all parties in a contested case must submit to genetic tests. The FSA did not, however, specifically require that states allow the results to be introduced into evidence. In response to comments on this point, the final federal regulations state that while HHS is not requiring states to enact laws admitting genetic test results into evidence, it encourages states to do so. 56 *Fed. Reg.* 22351 (May 15,1991).

It would be truly odd to require the parties to undergo testing if the results were not admissible. Thus, states should allow introduction of test results which 1) exclude paternity; and 2) include paternity at a high level of probability (e.g., 95 percent or more) See, e.g., Wy. Stat. §14-2-109(e)(iv) and Ark. Stat. Ann. §9-10-108(c)(1)(B). At the same time, it should be noted that the tests are not infallible: results should be admissible but **not dispositive** of the issue. See, Jackson v. Jackson, 322 S.E.2d 725 (Ga. 1985). Both parties should be able to question the procedures followed in obtaining the samples and analyzing the results.[5]

Recommendation 18: State legislatures should examine their existing statutes and, if necessary, enact new or revised ones which 1) require the parties in contested cases to submit to genetic tests; and 2) make test results admissible both to exclude paternity and as evidence of paternity if the results show a probability of 95 percent or more. Such statutes should also make provision for giving the parties time before trial to examine the test results, and specify the procedure for refuting the results.

It should also be noted that federal regulations clarify that there are two situations when the parties need not be required to submit to tests. The **first** is in the case of AFDC or Medicaid-only mothers who have obtained a "good cause" exemption from cooperation with the paternity process. They need not be required to undergo genetic tests, 45 C.F.R. §§302.70(a)(5)(ii) and 303.5(d)(1). The **second** is where paternity cannot be raised under state law, 45 C.F.R. §303.5(d)(2). Thus, if paternity cannot be raised because the issue is res judicata, or precluded by estoppel, or a state statute presuming legitimacy, genetic tests need not be ordered.

A related issue should also be addressed. Some existing state statutes refer to "blood tests." Strictly speaking, most

paternity testing now goes beyond blood samples. Thus, states should use the terms "genetic" or "scientific" in their statutes to cover the range of tests available.

Some states have actually specifically named the newest test – DNA fingerprinting – in their statutes. See, e.g., Ark. Stat. Ann. §9-10-108(a); Wy. Stat. §14-2-109(c). This not only authorizes the DNA test, but allows courts to accept it into evidence. This eliminates the problem of evidentiary challenge to the results, see, e.g., JLK v. JJ, 445 N.W.2d 673 (Wisc. App. 1989). While most believe DNA testing to be reliable, there is some concern about the fact that there do not yet exist technical or procedural standards for DNA labs. See, Office of Technology Assessment, Genetic Witness: Forensic Uses of DNA Tests, 052-003-01203-1 (July 1990). Thus, states contemplating enacting statutes which allow DNA tests to be administered and introduced into evidence might also consider enacting general licensing requirements for forensic DNA testing.

Genetic testing is costly. In a case called Little v. Streater, 452 U.S. 1 (1981), the United States Supreme Court held that in a contested paternity case where the state was involved, an indigent defendant had the right to obtain blood tests without first paying the cost. As a result of Little, most state IV-D agencies now pay for genetic tests in cases where low-income fathers are involved. Depending on state statutes, these funds may come from state or local sources, and are eligible for federal match. (As noted above, the match will now be 90 percent.) A few states, however, have not clarified the source of funding for these tests. Those states should use this opportunity to address the issue so that it does not prevent access to the tests.[6] Moreover, states should appropriate sufficient funds to cover the cost of the tests over the year.

If the alleged father is found to be the father, the court may assess test payment as "costs" of the action. Thus, in many cases, the state will ultimately recoup its initial outlay.

The FSA gives the states another option in **non-AFDC and post-AFDC cases.** Beginning November 1, 1989, they **may** charge a fee to recipients for genetic tests. On the whole, it does not appear that exercising this option would be very sensible. **First**, most non-AFDC and post-AFDC IV-D participants are low-income women. Just as the Supreme Court found in Little that denying prepaid tests to poor men in paternity cases was unconstitutional, it would appear that denying these tests to poor women who could not pay a fee would be constitutionally infirm. See, also, Boddie v. Connecticut, 401 U.S. 371 (1971). **Second**, a state's paternity establishment ratio would be negatively affected if significant numbers of mothers could not pursue paternity because of the fee. This would be counter-productive for the state. **Third**, these mothers are already being charged other fees and costs. Thus, any possible fiscal deterrent to bringing a false claim that a fee arguably represents already exists. **Fourth**, while the state may have to absorb these costs initially, it has a mechanism to recoup this cost from the father in a successful case. Indeed, the federal regulations require the state to seek a judgment of costs for the test when the action is successful. 45 C.F.R. §303.5(d)(3). There is simply no need to burden the mother with this expense even from a fiscal standpoint.

Recommendation 19: States should choose not to charge fees for genetic tests to non-AFDC and post-AFDC families.

3. Simple Civil Process for Paternity Establishment

As noted above, many states have enacted a simple process for establishing paternity in noncontested cases. Such a process makes it possible for fathers to acknowledge their children without hiring a lawyer, or paying costs and fees. These statutes also put the decision to proceed and the timing of doing so in the hands of the parents. They are not left waiting for the IV-D agency to act. These procedures may be particularly important for young people and those intimidated by the legal process.

Three models suggest themselves.

- In Illinois, the parents file a petition and proposed order with the court on standardized forms asking that paternity be established. All fees are waived, and the parties do not have to appear. The proposed order can also address issues of support, custody and visitation. Il. Rev. Stat., Ch. 40 §2506.

- In Massachusetts and Virginia, both parents can appear before a notary public and acknowledge parentage. Mass. Gen. Stat. ch. 209; Va. Code Ann. §20-49.1. In Massachusetts, the statement can also contain the parties' agreement on support, custody and visitation. This notarized statement is then filed with the court, an order is entered and a new birth certificate issued. Massachusetts law also makes it clear that minor parents can use this system without having to have a guardian appointed. It also requires the IV-D agency to give parents a written statement of their financial obligations before a paternity acknowledgment is signed.

- In Oregon and Missouri, noncontested paternity cases can be handled through the state's IV-D administrative process. Both parents file affidavits, an order is drafted and docketed, and a new birth certificate is issued. The administrative agency then deals with support and visitation. Mo. Ann. Stat. §454.485; Or. Rev. Stat. §416.430.

Recommendation 20: State legislatures should adopt systems which allow the parents of a nonmarital child to establish paternity in a simple, nonadversarial proceeding. An affidavit system would be preferable and could be helpful to states in meeting their paternity establishment percentage. Such a system should also be available to minor parents so long as they receive written explanation as to the consequences of the acknowledgment.

4. Civil Procedures for Contested Cases

Some states still do their contested paternity cases as criminal actions. This is costly and time-consuming from the state's point of view, and damaging to the father as it results in a criminal record.

The FSA encourages states to adopt civil procedures for establishing paternity in contested cases.

Recommendation 21: State legislatures which have not yet done so should adopt civil judicial procedures for handling contested paternities.

Even in states which have adopted civil procedures for contested paternity cases, it is not always clear that an indigent putative father has a right to appointed counsel. Several states (including Illinois, Montana, North Dakota and Wyoming) do provide this right by state statute. When the issue has been adjudicated, the overwhelming number of courts considering the question have found a constitutional right to counsel. See, e.g., Salas v. Cortez, 593 P.2d 226 (Cal. 1979); La Vertue v. Niman, 493 A.2d 213 (Conn. 1985).

It should be noted that HHS does not consider the expense of appointed counsel to indigent paternity defendants to be a cost reimbursable by the IV-D program. Nonetheless, even if the state alone pays the cost, there are not that many cases where the right would be invoked. Thus, the expense is not enormous. Moreover, if counsel is not appointed, the paternity finding could be overturned, Keeney v. Lawson, 484 N.E.2d 745 (Ohio 1984). The resulting chaos in the paternity system is not worth this price.

Recommendation 22: State legislatures should enact statutes requiring that the court appoint counsel to indigent paternity defendants.

Other issues which could be addressed are the state's evidence requirements and standard of proof. Some states still have on their books laws requiring the mother to meet an unreasonably strict evidentiary criteria for establishing paternity. In those states, statutes should be examined in light of advances in genetic testing to see if more modern evidentiary principles (e.g., mothers' testimony and test results alone are not enough to create prima facie cases) should apply. In addition, some states allow introduction of testimony about a mother's sexual conduct unrelated to the conception of the child. These provisions should be changed.

Other states require paternity to be established beyond a reasonable doubt or by "clear and convincing evidence." In Rivera v. Minnich, 107 S.Ct. 3001 (1987) the United States Supreme Court upheld a state's use of the "preponderance of the evidence" standard which is easier to meet.

Recommendation 23: State legislatures should take this opportunity to review their civil procedures and revise evidentiary standards and burdens of proof if current law is needlessly restrictive.

If these recommendations are adopted, the process of establishing paternity should be greatly simplified. Attention can then be focused on setting adequate support orders.

AN OVERVIEW

Once the noncustodial parent is located and paternity is established, the next step in the process is to obtain a support order. In some states this is done by judges or magistrates. In others, an administrative hearing officer will set the amount. (In this chapter, judges, magistrates and hearing officers will be referred to as "decisionmakers.")

Initially, decisionmakers consider the noncustodial parent's ability to pay. If that parent is unemployed and without assets, the decisionmaker may order a job search (see Chapter 9 for more on this). In the usual case, however, the noncustodial parent has some money. The first task of the decisionmaker, then, is to access reliable financial information. This might include wage statements, tax returns, bank account information, and information about property held by the noncustodial parent. See, e.g., Del. Fam. Ct. R. 151(b); Va Code Ann. §63.1-285.

Using this information, the decisionmaker establishes an order. In the past, the amount of the order was based on instinct plus some general criteria set by statute, case law or court rule. The one exception was in cases where the custodial parent was receiving AFDC. There, the IV-D agency made a support recommendation based on a child support formula. Under federal regulations, this formula had to take into account eight different factors and a copy was to be included in the state IV-D plan.

Awards set up this way tended to be low. They also tended to be inequitable. Noncustodial parents in similar economic situations had widely differing support obligations depending on the decisionmaker they appeared before, the bargaining ability of their lawyer, and the type of forum rendering the decision. In response, a few states developed specific numeric guidelines to help decisionmakers reach more equitable results.

Congress has pushed the process along. As part of the Child Support Enforcement Amendments of 1984, it required that all states adopt child support guidelines. Yet, while they had to be made available for use by decisionmakers, guidelines did not have to be used.

By October 1, 1987, all but a handful of states had met this requirement. In some states, the process of developing the guidelines was relatively simple. In others, there was enormous controversy.

Since guidelines reflect value judgments, this controversy was not surprising. Except in rare cases, there is not enough money to support the noncustodial parent, the custodial parent and the children at a luxurious level. Some or all of the parties will have to live on less than they would like. In the past, it was children and custodial parents who generally suffered. Under guidelines, some of the suffering was shifted to the noncustodial parent as the guidelines generally required her/him to pay a larger amount of support than (s)he would have paid in the past.

In some states disgruntled noncustodial parents sued to overturn the guidelines. In other states (especially those where they were not actively involved in the guidelines process), judges simply refused

to apply them, continuing to rely on their own discretion.

Yet, many states had success with the guidelines. This was especially true in states (e.g., Wisconsin) which adopted them as a rebuttable presumption of the correct amount of support. In those states, larger, more uniform awards resulted.

Guidelines do yield larger, more equitable awards. However, over time, the value of the award may diminish due to inflation. In addition, the situation of the parties may change: a child may develop a need for special education or health care that was not accounted for in the original order, or a parent may have a significant positive or negative change in income.

It is possible to modify a support award. In most states, however, this has been a difficult process. While a few states allow parents to petition for a periodic modification (e.g., once every two years), in most states a modification can be obtained only on a showing of substantial and continuing change of circumstances. This is a very high standard to meet.

For this reason, it has been very difficult to modify a child support award. This problem was compounded by the fact that some state IV-D agencies refused to provide modification services to non-AFDC clients. Other states were willing to provide this service, but were not clear whether existence of the guidelines alone constituted a change of circumstances sufficient to meet the state's modification standard.

CHANGES IN FEDERAL LAW

The FSA builds on the positive state experience with guidelines. It requires states to have guidelines which may be set by a legislative, judicial, or administrative body. 42 U.S.C. §667(a). Regulations implementing this provision were issued May 15, 1991 at 56 *Fed. Reg.* 22354. These regulations require that guidelines 1) take into consideration all the earnings and income of the absent parent; 2) be based on specific descriptive and numeric criteria; 3) result in a specific award; and 4) provide for the children's health care needs. 45 C.F.R. §302.56(c).

By October 13, 1989, the guidelines were to be used as a rebuttable presumption of the correct amount of support to be ordered. The presumption can be overcome only if the guideline amount would be unjust or inappropriate in a particular case. 42 U.S.C. §667(b)(2). While the state is free to define "unjust or inappropriate," the federal regulations state that the state's definition must include the best interests of the child. 45 C.F.R. §302.56(g).

Moreover, if the decisionmaker orders an amount other than the guideline, he/she must make a written finding or finding on the record. 42 U.S.C. §667(b)(2). Such findings must state the amount that would have been required under the guidelines and include a justification for the deviation. 45 C.F.R. §302.56(g).

To clarify that guidelines are to be used in AFDC cases, HHS has also repealed the old regulation that required states to have AFDC support formula, 56 *Fed. Reg.* 22354. AFDC support orders – like all others – are to be set under the guidelines.

In addition, the FSA requires states to review their guidelines at least once every four years. 42 U.S.C. §667(a). As part of this review, the state must consider economic data on the cost of raising children. It must also analyze case data from

decisionmaker's application of and deviation from guidelines. 45 C.F.R. §302.56(h).

Finally, the FSA requires states to assist parents in modifying support orders. 42 U.S.C. §666(a)(10). Final regulations on this provision have not been issued. However, HHS has indicated that its position is that the guidelines statute "on its face requires modification of orders which are inconsistent with a state's guidelines." 56 *Fed. Reg.* 22348. Thus, parents in a modification proceeding based on the guidelines do not need to show that there has been a substantial change in circumstances, id.

IMPLICATIONS FOR THE STATES

Guidelines

By October 1989, states were required to make their child support guideline a rebuttable presumption of the correct amount of support to be ordered. In states where guidelines were adopted legislatively, this should have been done by amending the state legislation.

In states where guidelines were adopted administratively or judicially the issue is more complex. Here constitutional issues such as separation of powers and delegation of legislative authority are involved. It seems clear that neither the judiciary, a commission, or an administrative agency on its own could promulgate guidelines as a rebuttable presumption to be used by themselves or others. The legislature would have to delegate to the court, agency, or commission the power to set guidelines. Drawing on the Supreme Court's recent decision in Mistretta v. United States, 109 S.Ct. 647 (1989) (a challenge to the validity of criminal sentencing guidelines set by a Sentencing Commission which was established by Congress as part of the Judicial Branch) the following would be necessary to make such a delegation constitutional:[7] 1) the legislature must specifically delegate the power to a particular body; 2) the delegation must contain a statement of the policy to be embodied in the guidelines and establish what the boundaries of the body's power are; and 3) the body should be composed of a variety of people (i.e., not solely judges, administrators, or legislators).

However, to avoid this troubling issue – one which might lead to a state's guideline being struck down – it would be wiser for the legislature itself to adopt the guidelines as a rebuttable presumption.

> **Recommendation 24**: Child support guidelines should be adopted by the legislature as a rebuttable presumption of the correct amount to be ordered in all child support cases.

A more difficult issue is what type of guideline should be adopted. There are three basic models now in use. Seventeen states use the **percentage of income** model. In these states, the noncustodial parent pays a percentage of his/her income as child support with the percentage varying depending on the number of children. Another 33 jurisdictions use the **income shares** model. Here an amount of support is calculated based on the income of both parents then divided between them based on their respective incomes. Three other states use the **Melson formula** which is multi-step guideline.

Several excellent publications on guidelines are available and should be consulted. (See Appendix D.) The following is a list of questions which should be addressed, whichever model is chosen:

1. How should "income" be defined? Is it gross income? Gross minus certain deductions (e.g., taxes, union dues)?

2. How should expenses such as medical care, child care, and extraordinary education expenses be treated?

3. How should orders covering more than one child be adjusted when one of the children dies or becomes emancipated?

4. Should the income of a subsequent spouse of either party be considered in setting support?

5. Should support obligations toward previous, subsequent or step children be considered in the guideline formula?

The latter questions are particularly important in light of recent data on remarried men which show that 88 percent had or expected to have either new biological children or step children or both.

Criteria must also be set for deviating from the guidelines. Many states now list the specific grounds for deviation from guidelines in the statute itself. See, e.g., Minn. Stat. 518.17. As long as the grounds for deviation are limited, this is a good practice as it narrows the chances that the guidelines won't be used.

HHS has made it clear, in regulations, that the criteria cannot exempt an entire category of cases nor can the criteria exclude an inordinate number of cases. 56 *Fed. Reg.* 22343. Thus, for example, that someone's income is above or below a certain amount cannot per se be a factor in rebutting the guidelines. Factors which might be appropriately taken into account are the child's own income and resources in relation to the parent's, and the existence of circumstances not taken into account by the guideline itself (e.g., special education, dietary needs). Factors which should **not** be allowed include parental debts (as this encourages noncustodial parents to incur debt) and whether or not the child is a marital child (as this would be unconstitutional). The criteria must also include the best interests of the child. 45 C.F.R. §302.56(g).

The state statute should also make it clear that the decisionmaker must make a written finding or a finding on the record when deviation from the guideline occurs. This finding should include a) citation to the statutory exception; b) facts indicating the basis on which the exception was found to apply; c) the amount which would have been granted under the guideline; and d) the amount actually set and the reason for the difference. 45 C.F.R. §302.56(g). This will make it possible to review the decision if either party appeals. It will also make it easier to do a periodic review of the order to determine if the guidelines should be applied at some later time because the reason for deviation no longer exists.

It would also be advisable to require decisionmakers to keep statistical records on cases deviating from the guidelines. This would help in the process of periodic reevaluation of the guidelines as it would provide a data source on the number of deviations, whether they were above or below the guideline amount, and the statutory basis for the deviation. If some pattern emerged from the data (e.g., existence of a second family caused decisionmakers to very from the guidelines 95% of the time) useful changes in the guideline might be obvious. Indeed, federal regulations require that case data be analyzed

(through sampling or other methods) at the time the guidelines are reviewed.

Recommendation 25: The guideline statute adopted pursuant to Recommendation 20 should make it clear that deviation from the guidelines is allowed only under specific enumerated circumstances. To deviate from the guideline the specific statutory exception must be cited, a written finding of why the exception is in the best interest of the child must be made, the amount applicable under the guidelines must be stated, and the amount actually ordered with reasons for the difference given.

Recommendation 26: Decisionmakers should be required by statute to keep statistical records of deviations and the reasons therefor.

At the same time as it deals with the question of who can make the guidelines a rebuttable presumption, the legislature should also establish the mechanism for the periodic review and update of the guidelines. Legislation should determine who will do the review, what procedure will be followed, and what process will be followed to change the guideline, if the reviewing body determines this is appropriate.

Whether a legislative committee, child support commission, agency or judicial body should be given the review task will likely vary from state to state. Whatever the entity is, there must be a requirement that the body consider the actual cost of raising children and data on deviations from the guidelines. 45 C.F.R. §302.56(h). It should hold public hearings, receive written testimony, and review parent's experience under the guidelines. The entity should also be required to make a written report of its findings which includes an evaluation of the guidelines in light of existing economic data (e.g., inflation, wage trends).

If the reviewing entity recommends changes in the guidelines, it should make specific proposals with supporting evidence to the legislature which should have the final authority to change the guidelines for the reasons discussed above.

Recommendation 27: State legislatures should establish a process under which some public body is required to hold hearings, take testimony, prepare a report, and make recommendations to the legislature at least once every four years on the need to revise the states' guidelines.

Modifying Orders

The modification provision contained in the FSA is not a model of clarity. Proposed federal regulations have been issued, but final regulations have not.

The statute makes several clear points, however. 42 U.S.C. §666(a)(10)(C). They are, that in IV-D cases:

- modifications under the child support guidelines are to be available to both custodial and noncustodial parents;
- that each parent must be informed of the right to request a review of the order;

- that when a review is conducted each parent must be notified 30 days in advance, and if an adjustment is proposed, there must be at least a 30-day period in which to initiate proceedings to challenge the adjustment. Likewise if it is determined that an adjustment is not warranted, there must be at least 30 days during which that determination can be challenged.

The statute also sets up a two-stage process for implementing the modification provisions. By October 13, 1990 the state was to have a plan for reviewing IV-D orders when requested by either parent or the AFDC agency. If such review indicates that an adjustment is warranted under the guidelines, a modification is to be sought. 42 U.S.C. §666(a)(10)(A). By October 13, 1993, the state is to review all IV-D orders at least once every three years. An adjustment under the guidelines is to be sought unless neither parent requests such modification.[8]

Federal law, then, allows states to limit modification under the guidelines to those using the IV-D system. However, most states find it unreasonable – if not unconstitutional – to have different rules applicable to cases just because they are processed by the IV-D agency. The better practice is to have the same rules for IV-D and non-IV-D cases. This also discourages use of the IV-D system by those who don't need its services but do want access to a procedure which is unavailable to non-IV-D clients.

The Preamble to federal regulations also advises the states that HHS believes that the law requires modification whenever warranted by the guidelines. Thus, state statutes or case law requiring that a "substantial change in circumstances" must be shown to obtain a modification under the guidelines must be eliminated. 56 *Fed. Reg.* 22348.

Recommendation 28: State law must make it possible for either parent to seek a modification of a support order at least once every three years solely on the grounds that the existing order is inconsistent with the child support guidelines.

As noted above, the FSA also spells out minimal notice and hearing procedures a state must follow in seeking a modification under the guidelines. In states using quasi-judicial or judicial processes for setting and modifying awards the statute governing the processes will need to be amended to comply with these procedures. In states using administrative procedures for IV-D orders, the administrative agencies must be empowered to modify orders in accordance with the FSA requirements. In these states, to make modification available in non-IV-D cases the state domestic relations law will also need to be changed.[9]

(*continued on next page*)

Recommendation 29: States should amend their administrative or/and domestic relations law to clarify the procedures to be used in modifying orders under the guidelines. The process will have to include advance notice of the right to request modification, notice of the proposed change or determination not to change, and a procedure to challenge the proposal or determination. The procedures will have to meet both federal and state due process concerns.

The procedures should allow for initiation of the process by the IV-D agency or, in non-IV-D cases, by the parties themselves.

The periodic review process will only be meaningful, however, if the decision-maker has access to accurate current information on the financial status of the parties. Thus, state law should establish a procedure under which such information must be made available on a periodic basis between the parties. See, e.g., Va. Code Ann. §63.1-285.

The easiest way to accomplish this is to send a request for production of financial records to both parties whenever either party invokes the right to a review under the guidelines. This request could be sent by the IV-D agency or the party's attorney in non-IV-D cases.

Recommendation 30: State legislatures should build into their modification statutes, a provision allowing the parties access to recent financial data so that they can determine whether it would be appropriate to proceed with a modification under the guidelines. This should be done by serving a legally enforceable request for production of documents or a subpoena to both parties when either requests modification.

While not spelled out in federal law, states will need to pay attention to the relationship between modified orders and income withholding. As modified orders are to be enforced by income withholding, it will be necessary to have a provision for informing employers, state agencies or others responsible for implementing such an order that the order has been modified.

Recommendation 31: State law on income withholding should be amended to spell out a specific procedure for informing employers or other involved entities when an order enforced through withholding has been modified.

In addition, in those states where the IV-D agency's power to seek modification of orders has not been clear, this would be a good time to amend the law to clarify that the agency has such power both in guidelines modification cases and in change of circumstances cases. Confusion on this issue will then end.

Recommendation 32: States whose IV-D statutes are ambiguous on the power of the IV-D agency to seek modifications should amend their statute to clarify that the agency has this power in both guidelines and change of circumstances cases.

States should also be aware that there are demonstration projects being conducted to develop recommendations on best practices in this area. Colorado, Delaware, Florida and Illinois will be evaluating what they find and issuing reports. Preliminary data indicate the number of requests for modification services is considerably less than anticipated. In addition, the number of cases where a downward modification has been appropriate is very small (e.g., 7 percent in Delaware).

The issue of downward modification has, however, been controversial in many jurisdictions. State IV-D agencies are troubled by the ethical implications of seeking a downward modification at the request of the noncustodial parent. This concern is well-founded. One approach – consistent with the statute – is to appoint outside counsel to represent the noncustodial parent if it appears that a downward modification would be appropriate under the guidelines and the noncustodial parent indicates that he/she wishes to pursue this.

Child Support and the Noncustodial Parent's Debt to the State for AFDC Paid to the Family

As noted above, a parent's child support obligation is based on her/his ability to pay. Separate and apart from this obligation, in most states, when a family receives AFDC, the noncustodial parent of the family accrues a debt to the state for AFDC paid out ("state debt"). This state debt is simply the grant amount and is not related to the noncustodial parent's ability to pay.

In some states (the "A" states), if the noncustodial parent is subject to a support order or pays under a voluntary agreement, his/her child support payments are deducted from the AFDC grant amount and the state claims a state debt for the difference. Several states (the "B" states), however, have adopted a more reasonable approach. See, e.g., N.C. Gen. Stat. §110-135; Ky. Rev. Stat. 205.715. In those states the amount of the state debt for AFDC paid out is limited to the amount of child support set by a court order.

> Example. Mr. and Mrs. C have three children. They divorced in 1986 and Mr. C was ordered to pay $200/month in support. In 1988, Mrs. C began receiving an AFDC grant of $350/month.
>
> In state A, if Mr. C pays faithfully, he has fulfilled his child support obligation. However, every month he is incurring a $150 debt to the state ($350-$200). In state B, by paying his child support regularly, Mr. C accumulates no debt to the state.

The state B approach encourages noncustodial parents to pay their support. As will be discussed in Chapter 7, it also greatly eases distribution of support collections when the family ceases receiving AFDC.

Recommendation 33: States which have not already done so should enact statutes limiting any claims to AFDC reimbursement they may have against a noncustodial parent to the amount specified as child support under a court or administrative order.

States should also consider the relationship between the state's AFDC debt and a parent's support obligation when there is no support order. Several courts have held, on constitutional grounds, that a state cannot claim AFDC reimbursement unless the noncustodial parent has been made aware that his/her child is receiving AFDC. Burns v. Swinney, 314 S.E.2d 440 (Ga. 1984); Dept. of Human Res. v. Johnson, 333 S.E.2d 845 (Ga. 1985). See, also Clarke v. Clarke, 517 A.2d 816 (N.H. 1986) and Kitchens v. Bowen, 825 F.2d 1337 (9th Cir. 1987) (dicta).

Some states have approached this problem by linking the answer to whether the state has pursued the noncustodial parent in a timely fashion. For example, in Kentucky, if the IV-D agency does not contact the noncustodial parent within three months of the family's application for AFDC, the state is precluded from seeking more than three months worth of reimbursement. This approach encourages states to seek orders in a timely way, not sit back, knowing that they can always claim a "state debt" regardless of whether they have established an order for the family.

Recommendation 34: States should adopt provisions limiting their ability to claim AFDC reimbursement in cases where the IV-D agency did not make a timely attempt to establish a support order for the family.

These recommendations should do much to assure equitable child support orders. These orders are meaningless, however, unless there is some ability to enforce them. Thus, we next turn to that issue.

AN OVERVIEW

Obtaining an equitable support order is only half the battle. There must be a means of enforcing it. Unfortunately, this is an area where progress has been slow. The Census Bureau found that in 1985, of those mothers who had support orders, only half actually received full payment. One-fourth received partial payment and one-fourth received no payment at all. In 1987, those numbers were exactly the same.

Prior to the CSEA of 1984, some states had developed a variety of techniques for enforcing support orders while others had very rudimentary systems. Congress addressed this problem in 1984, by requiring all states to implement certain basic enforcement mechanisms.

Chief among these is the requirement that states use wage withholding to collect payment in all child support cases in which the noncustodial parent has fallen into arrears. For cases not using the IV-D system, the CSEA prescribed no other specifics. For IV-D cases, however, very specific provisions apply. Withholding has to be available without the need to return to court or amend the order and it has to be triggered on the date on which the noncustodial parent has accumulated arrears equal to one month's support. At that time, the IV-D agency is required to send a notice to the delinquent parent informing him/her of (1) the amount alleged to be overdue; (2) the amount proposed to be withheld; (3) the procedures available to contest; (4) the amount of time the delinquent has to contest; and (5) that failure to contest in this time period is a waiver of the right to contest. The notice must also state that the withholding will apply to current as well as subsequent employers. Thus, once a withholding order is issued, a delinquent cannot avoid the consequences by changing jobs.

Federal law also provides a system for calculating the amount of income that will be withheld. First, current support must be withheld. Next, if state law allows, a fee to cover the employer's cost may be withheld. The amount of current support plus fees that can be withheld cannot exceed the maximum permitted by the Consumer Credit Protection Act (CCPA), however. Currently, the CCPA allows withholding of up to 50 percent of disposable income in the case of an earner supporting another spouse and/or child and 60 percent in the case of an earner without such dependents. ("Disposable income" is income after required deductions such as taxes and FICA have been taken.)

In addition to current support, the federal law also requires the states to use withholding to collect the arrears, as long as the CCPA maximum is not exceeded. If the arrears are longstanding (i.e., more than 13 weeks overdue), the CCPA limits on withholding increase to 55 percent for those with dependents and 65 percent for those without.

An example may be useful to illustrate how wage withholding under the CSEA of 1984 works:

> Example. Mr. Smith is employed at the XYZ Company and makes $1,300 per month. His mandatory payroll deductions equal $350 per month,

leaving him with disposable earnings of $950. He is married and has one child. Thus, the maximum amount that can be withheld from his income to satisfy a child support order on which he is not in arrears is $475 or 50 percent of $950.

Mr. Smith is the father of Jane Jones, and is subject to a court order of $200 per month for her support. Mr. Smith does not pay support for Jane for six months. Thus, $1,200 in arrears accrues. The IV-D agency then obtains a withholding order. Now Mr. Smith can have up to $522.50 or 55 percent of his $950 disposable income withheld because arrears more than 13 weeks old have accrued. The state can thus collect $200 in current support plus $322.50 in arrears each month until the $1,200 is repaid (three months at $522.50 and one month at $432.50). Thereafter, $200 for current support would be deducted each month.

If a delinquent parent wishes to contest a withholding, (s)he must be given an opportunity to do so. However, the process cannot take more than 45 days from the issuance of the notice of withholding. Moreover, federal law instructs that states must limit these contests to situations where the delinquent alleges there has been a "mistake of fact," i.e., the wrong noncustodial parent has been identified as the obligor, the amount of current support alleged to be due is incorrect, or the amount of arrears alleged to be due is erroneous.

In most cases, the delinquent does not object to the withholding, and withholding is implemented upon the expiration of the period in which to contest. In those cases in which a contest is raised, implementation (if appropriate), begins after the decision is rendered.

Implementation starts with the sending of a notice to the delinquent's employer. Among other things, this notice must tell the employer the amount to be withheld, that the withholding is binding until further notice, and that, if the employer fails to withhold, he or she is liable for the amount that should have been withheld. The notice must also inform the employer that withholding for support has priority over any other withholding authorized by state law. In addition, the notice must state that the amount withheld for support and any other orders cannot exceed the CCPA limits. If the state authorizes the employer to deduct a withholding fee, the notice will also tell the employer of the right to do so. The employer should also be told that it is illegal to fire, discipline, or refuse to hire an employee because of a withholding order.

The employer must then implement withholding and forward the payment (within ten days) to the state.

Federal law also requires that the states have a procedure for terminating withholding. It is up to the state, however, to decide what the criteria should be. The only specific limitation is that payment of arrears cannot be the sole criterion for termination.

States have had very different reactions to the wage withholding provisions of the federal law. Most have expanded the process to reach income other than wages (e.g., bonuses, commissions, retirement benefits). Some adopted statutes in which withholding was triggered by less than a one month's arrearage. For example, in Delaware, a seven-day delinquency is enough to trigger withholding. By-and-

large, however, they have had great difficulty in implementing this law.

A primary culprit in this area is recordkeeping. In some cases, state IV-D records are not kept in such a way as to allow a timely determination of when the triggering arrearage has accrued. In other cases, the records are sufficient but there is no automatic method of triggering the delinquency notice. The custodian must make a complaint before the agency acts even when agency records indicate that months or even years of arrearages are owed. If the noncustodial parent contests, even more time passes before the withholding order is issued. Thirty months, not thirty days, may elapse before withholding actually takes place.

In response, a number of states decided to go beyond federal law and use income withholding as a method of collection **before arrears** accrue. This is referred to as "immediate income withholding." In those states new or modified orders contained a provision for immediate withholding. The body which set or modified the support order simultaneously issued the withholding order and sent it to the employer. Withholding commenced with the employee's next pay period.

The advantages of such a system are obvious. Custodians receive regular and timely payments of support: they are not left in a state of perpetual uncertainty about whether funds will arrive. Noncustodians never have the money in hand and are not tempted to spend it. Moreover, arrears do not accrue and, thus, noncustodians are not subject to the other fairly draconian enforcement mechanisms which are discussed below. Indeed, for noncustodians deductions for support become the equivalent of tax and Social Security deductions.

Income withholding is not an effective tool in reaching the self-employed or those who work in the underground economy. However, the Child Support Enforcement Amendments of 1984 required states to have several remedies available which are useful in pursuing this population. Two of these remedies – the imposition of liens on a noncustodian's real and personal property and permitting credit rating agencies to request information about delinquent parents – have proven particularly effective. (They can also be used in conjunction with wage withholding to collect arrears.)

THE NEW FEDERAL LAW

The FSA leaves intact the requirements of the 1984 law on enforcement mechanisms such as liens, and reports to credit agencies. It requires major changes in the income withholding statutes, however.

IV-D Cases

One set of changes affects cases being handled by the state IV-D agency. Pursuant to 42 U.S.C. §666(b), by November 1, 1990, states were required to use immediate income withholding in all **new or modified** IV-D orders unless 1) the court or administrative agency issuing the order and there was "good cause" for not ordering withholding; or 2) both parties agreed, in writing, to an alternate payment arrangement. This provision will interface with the periodic review under the guidelines provision discussed in Chapter 5. As decisionmakers review orders under the guidelines, they will also have to order immediate income withholding unless one of the exceptions applies.

For old IV-D orders on which modification is not sought and for new/modified IV-D orders in which an exemption is

initially granted under the good cause or parental opt-out provisions, wage withholding will have to be available on the date on which the noncustodial parent falls behind in payment in an amount equal to the support payable for one month or such earlier date as the state selects. (In other words, the process on withholding when there are arrears described above, will be applicable in these cases.)

In addition, wage withholding will have to be available in IV-D cases on the date as of which a) the noncustodial parent requests that withholding begin; or b) the custodial parent requests that withholding begin if this request is consistent with state procedures and standards. In each of these instances, the withholding must be available without the need to return to court or amend the order. Federal regulations on this provision were issued but have not been finalized. 55 *Fed. Reg.* 33415 (Aug. 15, 1990).

Non-IV-D Cases

The second set of changes applies to non-IV-D cases. By January 1, 1994, immediate wage withholding must be available in all **new** child support orders unless (as in IV-D cases) there is good cause or both parties agree to an alternate arrangement. The law also extends many of the protections for payors in IV-D cases found in the 1984 law to payors in non-IV-D cases. These include a) that the withholding must be administered by a public agency; b) the amount withheld cannot exceed the Consumer Credit Protection Act limits; and c) some provision for terminating such orders must be established. In addition, these orders must be given priority over other wage withholding orders and immediate withholding orders from other states must be honored. To be codified at 42 U.S.C. §666(a)(8).

In modified non-IV-D orders, nonmodified non-IV-D orders, and new non-IV-D orders issued after January 1, 1994 where a good cause/parental agreement was reached, the law requires that the state have some provision for wage withholding when arrears accrue.

Finally, the FSA, requires HHS to conduct a study of the administrative feasibility, cost implications and other effects of enforcing all orders nationwide through immediate income withholding. The results of this study are to be reported to Congress in October 1991. 42 U.S.C. §666 note.

IMPLICATIONS FOR THE STATE

The primary focus for state legislatures will be amending the income withholding laws. However, as there is both genuine concern about how to reach noncustodial parents who are not amenable to withholding and substantial evidence that liens and consumer credit reports could be of real value in reaching such obligors, it would be wise to also examine state laws in these areas to see if they can be improved.

Liens

Lien laws must cover both real (e.g., land or a home) and personal (e.g., a bank account, or a trust fund) property. A lien can be filed and no other action taken thereon or it can be filed and then foreclosed. Ideally, a state should make liens available in both **IV-D** and **non-IV-D** cases and allow the custodian or IV-D agency to simply file the support order itself as a lien covering both current support and arrears. So long as payment is made, no further action would be taken. If the noncustodial parent falls into arrears, however, the custodian or state IV-D agency could foreclose. For examples of

this approach, see N.D. Cent. Code §14-09-09.5; R.I. Gen. Laws §15-5-28; Neb. Rev. Stat. §42-371. Indeed, Washington has an aggressive "seize-and-sell" program which not only acquires property to pay off the debt but lets the self-employed know that the state has remedies for nonpayment. This encourages payment of support.

Recommendation 35: States should review their lien laws to determine if such laws need revision. At a minimum the lien law should apply to non-IV-D as well as IV-D cases, apply to current support as well as arrears and be easy to file and execute.

Credit Reports

In the credit reporting area, federal law merely requires that this procedure be available in IV-D cases when the amount of arrears exceeds $1,000 and the credit agency requests such information. According to the Government Accounting Office, however, by early 1990, 21 states had gone beyond this – making routine unsolicited reports of arrears. OCSE reports that by July 1991, only 15 states were not operating automatic reporting at least somewhere in the state.

Each state has a slightly different practice as to the amount of delinquency and its duration before the credit report would be sent. For example, Utah reports amounts as little as $1 if they are 30 days in arrears. Nebraska reports amounts of $25 if the arrearage is one day old.

Vermont goes much farther. It reports the existence of a child support order once entered even if there are no arrears. Vt. Stat. Ann. tit. 15, S 793. Credit reporting agencies are said to prefer this approach. It also rewards those who do pay: they can demonstrate that they reliably pay their debts.

States which do automatic credit reporting document a significant impact on collections. Kentucky reports collecting $627,000 in two and one-half years that were directly attributable to this program. They also mention that the credit bureaus are a significant source of useful information in locating the noncustodial parent and/or finding hidden assets.

Recommendation 36: States should revise their credit reporting laws to provide automatic reporting to credit agencies. The law should require that the existence of a child support order be reported even if there are no arrears. In the alternative, arrearages which exceed one month's support automatically reported to credit agencies at least quarterly.

Wage Withholding

As noted above, the FSA requires that states use immediate income withholding in **new or modified IV-D orders** but only in **new non-IV-D** cases. In addition, immediate withholding must be available in new or modified IV-D cases by November 1990 but need not be available in non-IV-D cases until January 1994. States which fulfill only these federal mandates will probably find their ability to obtain immediate withholding orders very limited.

This is because (except in paternity cases) the IV-D agency itself obtains very few new orders. Usually, a client has an order which she brings to IV-D to enforce or she obtains an order herself in a

divorce action. (Since IV-D agencies can't do divorces, they rarely become involved in such cases, even when the client is on AFDC.) Thus, the reach of the law will be extremely limited until 1994.

Prior to 1994, then, the IV-D agencies will primarily be obtaining immediate withholding orders in paternity cases and in modification proceedings. However, IV-D agencies are not required to bring modification cases under the guidelines on a large scale until 1993, when the guidelines modification provisions discussed in Chapter 5 become effective.[10] This will again limit the scope of the immediate withholding remedy.

Moreover, if immediate withholding on old orders can only be obtained through a modification proceeding brought by the IV-D agency, many who do not need IV-D services but want access to immediate withholding will apply for IV-D modification services. This will overload the system and make it difficult to serve those whose only source of assistance is the IV-D agencies.

For these reasons, many states have chosen to implement immediate withholding in all new or modified cases simultaneously. See, e.g., 15 Vt. Stat. Ann. §781.

Recommendation 37: States should adopt laws making immediate income withholding available in all new and modified orders issued in the state regardless of whether the case is IV-D or non-IV-D.

Federal law also says that states must make immediate withholding available in IV-D cases when it is requested a) by the noncustodial parent, or b) the custodial parent when the state agrees that the request is appropriate.

This provision could and should be expanded to allow both IV-D and non-IV-D cases with existing orders to obtain immediate withholding without having to seek a modification of the order. This would allow those who preferred this method to use it without the necessity of applying for IV-D services.

Recommendation 38: States should allow both noncustodial and custodial parents to elect immediate income withholding at any time separate and apart from a modification proceeding. Procedures for doing this should be spelled out in the statute and should apply to non-IV-D as well as IV-D cases.

In addition, income withholding must continue to be available when the noncustodial parent is in arrears. States generally have laws on the books for these situations. However, many of these laws do not completely meet the federal requirements.

Recommendation 39: States should review their existing laws on withholding when there are arrears to make sure they meet federal requirements. In addition, these laws should be amended to include a method for obtaining withholding in cases where immediate withholding was not originally imposed because a good cause exemption was found or the parties agreed otherwise and it now appears immediate withholding is desirable.

In addition to questions of availability, there are issues as to what types of income can be covered by withholding.

As noted above, while many noncustodial parents do receive wages, many do not. They do, however, have regular income from other sources which could be made subject to withholding. A number of states have taken advantage of this to expand withholding to a broad range of income (see chart). This includes such payments as unemployment compensation, Longshoreman and Harbor Workers Act Compensation and pensions.

However, it should be emphasized that, if states adopt broadly-worded statutes, they should include language in those statutes that exempt needs-based payments, such as public assistance, from withholding. For instance, Illinois' statute causes any form of periodic payment to be subject to withholding, including, but not limited to, wages, salary, commissions compensation as an independent contractor, workers' compensation, and disability and retirement benefits. It then specifically excludes from withholding public assistance payments, amounts exempted by federal law, and funds required to be withheld by law, such as taxes and Social Security. Il. Rev. Stat ch.23, §10-16.2(A)(4).

Recommendation 40: States should go beyond wages to include all possible forms of periodic income except needs-based public assistance in their definition of income which can be made subject to immediate withholding.

States might also consider a new pilot program being tried in Washington. To facilitate withholding (especially in the case of seasonal employees and who change jobs frequently), certain employers are now reporting all new employees, within 35 days of hire. They report the hiring to the state's Employment Security Department. Through a cooperative agreement with the IV-D agency, cases where the employee was delinquent on a child support obligation were identified. Enforcement action – including income withholding – is then commenced. Wash. Rev. Code 26.23.040.

The most troubling part of withholding is the possibility that an employer will discharge an employee whose wages are subject to withholding. This is a common practice that has not been eliminated, even by protective federal legislation. Clients in this situation may be able to file suit under Subchapter II of the Consumer Credit Protection Act makes it illegal to discharge an employee for being subject to a garnishment for a **single** indebtedness. Willful violation of the law subjects the employer to a $1,000 fine and a year in prison. There is a good deal of evidence, however, that this provision is of limited value.

Under the Child Support Enforcement Amendments of 1984, states should have laws under which employers who retaliate against employees subject to support withholding orders in IV-D cases are subject to a fine. This includes fines against an employer who refuses to hire or takes disciplinary action against an employee, as well as an employer who discharges the employee. In addition, the notice of withholding sent to the employer must state this fact so that the employer is aware that a fine will be imposed.

Recommendation 41: States should review existing law on employer retaliation and amend it if necessary. A fine of $1,000 for discharge,discipline or failure to hire an employee subject to a withholding order should be imposed in order to be consistent with the CCPA. Moreover, increasing fines against employers for second, third, and subsequent retaliatory actions and imposing prison terms for willful violations should be enacted.

In addition, state laws may give employees a private right of action to sue employers for refusal to hire, for disciplinary action taken, or for wrongful discharge when the employer's action is motivated by a withholding order. These laws allow employees to seek reinstatement, restitution, and punitive damages.

Recommendation 42: States which have not already done so should extend to persons subject to a withholding order a private right of action to seek actual and punitive damages from employers who refuse to hire, fire or take retaliatory action against them due to a withholding order.

Thought might also be given to making an employer who fails to withhold under a wage withholding order liable to the custodial parent for the money. See, e.g., Ark. Stat. Ann. §9-14-225.

At the same time, procedures for employers to use to streamline the withholding process must be adopted. States which have taken the time to prepare explanatory materials for employers, appoint an ombudsman within the IV-D agency to handle problems, and/or establish a telephone line staffed by a person trained to help employers are techniques which have been successfully used.

Improving collections through withholding, however, will only be a successful strategy if the money actually reaches the custodians and children for which it is intended. Improving the process for and timing of such distribution is therefore the subject of the next chapter.

AN OVERVIEW

In FY 1990, the IV-D system collected $6.05 billion: $1.75 billion in AFDC cases and $4.30 billion in non-AFDC cases. One of the most problematic areas of IV-D practice is the proper distribution of this money. To understand the nature of the problems, it is necessary to first look at the requirements of federal law.

When a custodian applies for or receives AFDC, she is deemed to have assigned to the state her right to collect support. This assignment covers both current support and any arrears which have accrued, and lasts as long as the family receives AFDC. When the family no longer receives assistance, the assignment ends. The custodian regains her right to collect current support: if there are arrears, however, the state may claim those arrears up to the amount paid out in AFDC. An example will illustrate this system in action:

> Example: Mr. and Mrs. A divorced in 1987. The court ordered Mr. A to pay $500 month in support. Mr. A was sporadic in his payments and by August 1988 was $2,000 in arrears to Mrs. A. At that point, Mrs. A applied for AFDC and received a grant of $300 per month for August and September of 1988. During those two months Mr. A made no support payments. She then left the AFDC system. By virtue of being an AFDC recipient in August and September, Mrs. A had assigned to the state her right to collect $500 per month. She had also assigned her right to the $2,000 in arrears. When she left the AFDC rolls, the right to the $500 in current support each month reverted to her. The state's claim was limited to $600 ($300 in AFDC per month times 2 months). Thus the right to the $2,000 in old arrears and to $400 in current arrears ($1,000 owed by Mr. A. for August and September minus $600 claimed by the state under the assignment) reverted to Mrs. A.

When a custodian receives AFDC and the state IV-D agency makes a collection under the assignment, it must distribute the money in accordance with federal law. This law requires that 1) the first $50 collected (or a smaller amount if less than $50 is paid by the noncustodial parent) is given to the family. This amount is called a "pass-through" and the family gets this money in addition to its regular AFDC grant and without affecting its AFDC eligibility; 2) next, the state and federal governments are reimbursed for AFDC paid to the family that month; 3) then, if there is money left, the family gets it up to the amount of the current month's obligation (excess support); 4) if there is still money left, the state keeps it to reimburse itself for any arrears owed to it under the AFDC assignment. If no arrears are owed the state, then the money can be used to pay arrears owed to the custodian. (Excess support and arrears are considered to be income and do affect AFDC eligibility and grant amount.) Again, an example may be helpful in understanding the system:

> Example: In the situation of the A family described above, the state makes a collection of $900 in August 1988. Five hundred dollars of this money would be considered to be current support. Of this, the first $50

would be paid to Mrs. A; then the state would take $300 to reimburse for AFDC paid out; the next $150 would go to Mrs. A. as current support. The other $400 would also go to Mrs. A as a credit toward the arrears owed her.

If no collection had been made in August but $900 had been collected in September, the first $500 would be distributed in the same way as described above. Of the other $400, $300 would be claimed by the state as arrears owed it for August's AFDC payment: the other $100 would go to Mrs. A.

In the past, AFDC recipients have faced three major problems with this system. They are 1) obtaining the $50 pass-through on payments made by the noncustodian; 2) obtaining the other support which should have gone to the family when the noncustodian's obligation exceeded AFDC paid out; and 3) obtaining arrears owed to the family. In addition to these problems, the AFDC custodian may have to wait a very long time to actually receive her money.

For non-AFDC families using the IV-D system, the issues are a little different. If the family never received AFDC, then all collections made on its behalf must be given to the family.[11] For these families, the timeliness of the distribution of the support payment is the fundamental issue.

If, however, the family received AFDC in the past, the situation is more complex. Collections must first be treated as payment on a current month's obligation. Any amount collected in excess of this is arrears and must be distributed under federal law. This law states that distribution in post-AFDC cases must be done on the same basis as in cases which never received AFDC.[12] In these cases determining how to allocate the collection and time lines for distributing money owed to the family are both at issue.

CHANGES IN FEDERAL LAW

The FSA required HHS to issue regulations setting time frames within which a state must distribute support collections. 42 U.S.C. §652(f). These regulations were issued in August 1989 and became effective October 1, 1990. The regulations provide as follows:

- **In AFDC cases** where a pass-through is owed to the family, the time frame for sending the pass-through depends on whether the state IV-D agency or the state AFDC agency is responsible for the distribution. Where the IV-D agency is responsible, the pass-through must be sent to the family within 15 calendar days of the date the state initially receives at least $50 of support for the month. If less than $50 is collected in the month, then the pass-through must be sent within 15 calendar days of the end of the month in which support was collected, 45 C.F.R. §302.32(f)(2)(i). Where the AFDC agency is responsible for distributing the pass-through, the time frame is extended to 20 calendar days, 45 C.F.R. §232.20(d).[13]

- **In AFDC cases,** where the family is owed excess support under or arrears with one exception, payment must be sent within 15 calendar days of the date of initial receipt in the state of a collection for the first month of the family's ineligibility for AFDC, 45 C.F.R. §302.32(f)(2)(ii).[14]

- **In non-AFDC cases,** current support must be sent to the family within 15 calendar days of the date of initial receipt in the state, 45 C.F.R.

§302.32(f)(3)(i). With one exception, arrears must also be sent to the family within 15 calendar days of initial receipt in the state. 45 C.F.R. §302.32(f)(3)(ii).

• **In post-AFDC cases**, current support must also be sent to the family within 15 calendar days of initial receipt in the state. In addition, if arrears are collected which under state law or policy belong to the family (i.e., there are no AFDC arrears owed to the state or the state policy is to pay client arrears first), then (with one exception) those arrears must be sent to the family within 15 calendar days of the date of initial receipt in the state. 45 C.F.R. §302.32(f)(3)(i) and (ii).

• **The exception** to the 15 calendar day time frame for distributing **arrears** owed to AFDC, non-AFDC and post-AFDC families occurs if the collection was made as the result of a state or federal income tax intercept. Here the general rule is that the collection must be sent to the family within 30 calendar days of receipt by the IV-D agency, 45 C.F.R. §§302.32(f)(2)(iv) and 302.32(f)(3)(iii)(A). Also, in <u>non-AFDC</u> cases, the state retains the option in current 45 C.F.R. §303.32(h)(5) of retaining **federal** tax intercepts which were taken from a **joint return** for up to six months, 45 C.F.R. §302.32(f)(3)(iii)(B).

The FSA also clarified that on or after January 1, 1989, the $50 support pass-through must be given on any payment made by the noncustodial parent in a timely manner. 42 U.S.C. §§602(a)(8)(A)(vi) and 657(b)(1). Regulations explaining how to determine what is timely were issued May 15, 1991. 56 *Fed. Reg.* 22335-22355. These regulations clearly state that when payment is made through wage withholding, the date the money is withheld is the date of payment. 45 C.F.R. §302.51(a)(4). Employers must not only withhold the money but also inform the IV-D agency when the withholding occurred. 45 C.F.R. §303.100(d)(1)(ii). When payments are made by mail, the state must establish a policy on whether payment is deemed made on the date of postmark or the date of receipt. 45 C.F.R. §302.51(a)(5)(ii).

Finally, the FSA requires that, starting in January 1993, states must give AFDC recipients monthly notice of support collections made on their behalf.

While final regulations on this point have not yet been issued, proposed regulations indicate HHS intention to require very little information be contained in the notice. Moreover, until full computerization is required in 1995, HHS contemplates freely granting waivers to states to issue quarterly notice, 56 *Fed. Reg.* 33425 (August 15, 1990).

These changes in the law will have an enormous impact on the IV-D program.

IMPLICATIONS FOR THE STATES

The changes discussed above affect different types of cases differently. Therefore, for ease of discussion, the issues will be addressed by category: non-AFDC, former AFDC, and current AFDC cases.

Non-AFDC IV-D Cases

Support collected for non-AFDC families goes to the family. A collection is first credited to current support: any excess is a payment on arrears. If there are no arrears, the collection may be credited toward future payments. 45 C.F.R. §302.51(a) and (c).

The major issue for these families is the timeliness of a state's payment of the money to the custodian. The HHS regulations require payment within 15 days of receipt of the money in the state for all payments except those made by federal tax intercept. This rule applies to both current support and arrears. States are free to adopt even shorter periods. Some states have already acted in this regard setting time frames in the two- to three-day range. See, e.g., Fla. Stat. §61.181(5); Mo. Rev. Stat. §452.345.2

Whatever time frame is adopted, however, states will have to be sure the time frame can be met. In some places, the money first goes to the clerk of the court, then to the IV-D agency and then to the client. This activity will now have to be completed within 15 days. In other states, check processing is an issue. In those states, the state treasury system is complex and requires weeks to process and mail a check. State law will have to be changed to allow the state treasury to establish a special fund, outside the normal treasury system, for processing IV-D checks. See, e.g., WVa. Code 48A-2-12(a); Mass. Stat. Ann. ch. 119A, §9-11.

A few states wait for the noncustodial parent's check to clear before paying the custodial parent. Federal banking regulations make this fairly quick (four days for in-state checks and seven days for out-of-state checks). However, states should not wait this long: they can make payment before the check clears. If the check is subsequently dishonored, the noncustodial parent can be required to make future payments in cash, by certified check or by money order.

Recommendation 43: The 15-day time frame for distributing current support payments and arrears to non-AFDC IV-D clients should be viewed as a maximum. States which have computerized their systems and/or automated so that they can turn payments around more quickly should adopt shorter time frames, preferably in the two- to three-day range.

Post-AFDC Cases

One of the major problems for post-AFDC families is getting current support payments redirected to them once they leave AFDC. Some states simply attribute any collection to AFDC arrears and keep the money. This is now expressly forbidden. 45 C.F.R. §§302.51(a)(1), 56 *Fed. Reg.* 22353 (May 15, 1991) and 302.51(f)(4), 56 *Fed. Reg.* 8004 (Feb. 26, 1991). All collections must be first considered to be current support.

In other states, the problem is timely distribution of the funds. The first step is to make sure that the IV-D agency redirects payment from the AFDC agency to the custodial parent. Federal regulations now require that the family receive its support for the month after it receives its last AFDC payment within 15 calendar days of the state's initial receipt of the money. 45 C.F.R. §302.32(2)(ii). Thereafter, each monthly current support payment must be sent to the family within 15 days of initial receipt in the state, id. However, the states are free to move more quickly.

Recommendation 44: State law should require the redirection of current support to post-AFDC families within a maximum of 15 days from the time the family ceases receiving AFDC. Thereafter current support payments should be sent to the family within the same 2-3 day time frame as current support is sent to non-AFDC families.

Until recently, federal law created two classes of post-AFDC recipients. One group was "in transition" from AFDC to non-AFDC status. During the five-month period after the custodian ceased receiving AFDC, families in this group were to continue to receive IV-D services. If money were collected on their behalf it was to be given to the family first for current support and then for post-AFDC arrears. Only if collections exceeded this amount did the state have a claim for AFDC arrears.

The second group were post-transition clients. At the end of the five-month period, if the custodian opted to continue receiving IV-D services, the IV-D agency could continue to make collections. If the collection was of current support it was to be given to the family. If the amount collected was in excess of the current support obligation, HHS took the position that the state could determine whether to distribute the money to itself to reimburse for AFDC arrears or to the family for its arrears.

In late 1987, Congress changed the wording of the post-AFDC distribution statute. The "transition period" concept was abolished. Now all post-AFDC cases are to be treated the same. If the family opts to continue receiving IV-D services, money collected on its behalf is to be distributed "subject to the same conditions and on the same basis as" to non-AFDC recipients, 42 U.S.C. §657(c). See, also House Conf. Rept. No. 100-495, 1987 U.S. Code Cong. & Admin. News, p. 2313. In regulations, HHS has determined that this allows states three options when it collects arrears for post-AFDC families: 1) pay the family any arrears owed to it and then pay arrears owed to the state; 2) pay the family's post-AFDC arrears, then the state's AFDC arrears and then the family's pre-AFDC arrears; or 3) pay the state's arrears first and then pay the family. Ohio was chosen the first approach, Ohio Rev. Code 3113.2(k) while 18 other states (including Connecticut, Kansas, Georgia, Illinois and Oregon) are examples of states which have taken the second approach by law or regulation. See, e.g., Wash. Rev. Stat. 26.23.030; Ind. Code 12-1-6.1-12(b).

The reason for this is simple. In most post-AFDC cases the custodian is still lower income, struggling at a job and trying to keep her family from having to reapply for benefits. She may be in debt from bills accumulated because the non-custodial parent was behind in support payments. It is a wise investment of money to give the support arrears to the custodian to ease her financial plight and prevent her having to reapply for AFDC.

Recommendation 45: State law should require that if there are support arrears owed to the custodian in a post-AFDC case, those arrears be paid to the client before the state asserts any claim to AFDC arrears.

AFDC Cases

1. The $50 Pass-through

In AFDC cases, the first concern is with distribution of the $50 pass-through. This money is critically important to AFDC families, because AFDC grant levels are very low. For some families the pass-through may even mean the difference between homelessness and shelter.

In FY 1989, AFDC families received $307 million in pass-through payments. They could have received even more if states and HHS had properly implemented the intent of the law. In fact, over a dozen states have been sued for failing to give the pass-through in appropriate cases.

The bulk of these cases involved payments which were made on time by noncustodial parents but not processed by the state in a timely manner. Several cases also included the problem of interstate collections where parents paid timely in the collecting state but payments were not sent to the receiving state until one or more months later. Without exception, courts found refusal to give the $50 pass-through in these situations to be contrary to the law.

Partly as a result of this litigation, HHS amended the regulations, 53 *Fed. Reg.* 2164 (June 9, 1988). This change states that as of June 9, 1988, the "date of collection" is the date of receipt by the IV-D agency or (if earlier) by the entity authorized to make collection. Thus, for example, if the clerk of the court received the money on time or the responding state in an interstate case received payment in a timely manner, the family is entitled to receive the passs-through no matter when the IV-D agency credited the payment.

A major issue remained unresolved by the amended regulations, however. When a payment was made by withholding, HHS continued to insist that the date of receipt by the collecting entity, not the date of withholding from the noncustodial parent's paycheck, was the "date of payment." Thus, if the employer withheld a payment but failed to send it to the IV-D agency in the same month, the family was denied the pass-through.

The FSA amended 42 U.S.C. §657(b)(1) and 42 U.S.C. §602(a)(8)(A)(vi) to clarify Congressional intent in regard to the pass-through. The language reaffirmed the various court decisions as well as HHS June 9, 1988 regulations. It is now clear that, under federal law, whenever the noncustodial parent of an AFDC family makes a timely payment, his/her family is entitled to a pass-through.

> **Recommendation 46**: State law and regulations should require that the child support pass-through be available whenever the noncustodial parent makes a timely support payment. State law should also require that any government entity making collection (e.g., clerk of court) must report the date of payment to the IV-D agency so that timeliness can actually be determined.

In accordance with this, HHS switched its position on payment through wage withholding. Federal regulations now clearly state that if a child support payment is made through wage or other income withholding, the date of withholding is the date of payment. 45 C.F.R. §302.51(a)(4). To facilitate the implementation of this principle, notices to the

employers to initiate withholding must now inform those employers that they must report the date on which the money was withheld from the noncustodial parent's wages. 45 C.F.R. §303.100(d)(1)(ii). If the employer fails to provide this date, the state may either contact the employer or "impute the wages to have been withheld in the month wages were due to be withheld in accordance with the court or administrative order." 56 *Fed. Reg.* 22336. If the collection is made in an interstate case, the responding state must inform the initiating state of the date of withholding. 45 C.F.R. §303.7(c)(7)(iv).

Recommendation 47: State income withholding laws and regulations should state that a) for purposes of the $50 pass-through, the noncustodian is deemed to have paid on the date the money is withheld from his/her paycheck; b) the notice of withholding issued to the employer must inform employers that they must provide the date the money was withheld; and c) failure to inform the state IV-D agency when the withholding actually occurred subjects the employer to a fine.

Recommendation 48: The state should adopt a policy under which a payment is deemed timely made whenever the payment is received but no date of withholding is provided.

Further, the state will have to develop a policy on determining when mailed payments made by the noncustodial parent are deemed paid. According to HHS, the state has the option of treating the payment as made on the date it is mailed or on the date it is received by the entity making the collection. 45 C.F.R. §302.51(a)(5)(ii). However, some courts have held that, consistent with the statute, mailed payments must be deemed made on the date of postmark. See, Berg v. Gardebring, 708 F.Supp. 238 (D. Minn. 1989); Lawyer v. Valdez, No. Civ. 88-0620-JC (D.N.M. Aug. 16, 1990). To avoid such litigation, such states should opt for a date of mailing rule.

Recommendation 49: States should adopt a regulation deeming mailed payments by noncustodial parents to be made on the date payment is mailed as evidenced by a legible postmark or a dated receipt from a commercial mail carrier.

This would also be a good time to establish time frames within which the IV-D agency must actually deliver the pass-through to the family. Current regulations require that this be done within 15 to 20 days of receipt of the first $50 in support by the state. However, states could adopt shorter periods.

Recommendation 50: State legislation should require that the child support pass-through to AFDC families be distributed within 2-3 days of initial receipt in the state of at least $50 in support or within 2-3 days of the end of the month if less than $50 is collected.

To an AFDC family, the value of the pass-through is lessened somewhat when the family also receives food stamps. This is because the pass-through **is counted** as income for food stamp purposes. When a family receives the full pass-through, its

food stamps are reduced by approximately $17. States can enact a food stamp child support disregard to eliminate this problem. However, the cost of doing so must be borne by the state.

As a matter of policy (i.e., providing maximum encouragement to noncustodial parents to pay support) this option should be considered.

2. Distribution of Excess Support

As noted above, a custodian may be entitled to support payments over and above the pass-through. This can happen when the current support order is greater than the AFDC grant and the noncustodial parent actually pays the full amount. In this case, the amount left after the state has been reimbursed for AFDC goes to the custodian. Many state systems have not been distributing this excess support to custodians. Instead, the state agency is retaining this money illegally. Several suits have been filed on this problem. See, e.g., Bennett v. White, 865 F.2d 1395 (3d Cir. 1989).

Recommendation 51: State agencies should make sure they are following the federal law in regard to distribution of excess support in AFDC cases. Such payments should be distributed in accordance with the time frames regulations for payment of other support.

If excess support is received on a regular basis, the family should ultimately be removed from AFDC. If support payments are sporadic, some states nonetheless remove the family from the AFDC program and then force them to reapply when the noncustodial parent misses a support payment. This can create great hardship on a family, see, e.g., Yelder v. Hornsby, 666 F.Supp. 1518 (M.D.Ala, 1987).

Federal law states that a family's eligibility for AFDC must be determined prospectively and be based on the best estimate of income which will be available. Thus, occasional but irregular payments should not be grounds for removing the family from the rolls. Yelder, supra. However, it may make the family ineligible for a payment in a particular month, depending on the budgeting system in use. To cover this situation, the state should have a procedure to suspend a case (i.e., keep it active without an actual payment) until a regular pattern of support has been established.

Recommendation 52: The state agency should adopt a procedure for suspending an AFDC case due to excess support until the noncustodial parent establishes a regular pattern of payment.

3. Distribution of Arrears

An AFDC family might also be entitled to a payment on arrears. This will happen when 1) the noncustodial parent makes a support payment, including current support and arrears; 2) there are little if any arrears owed the state (e.g., the noncustodial parent has been current in payments at least while the family is on AFDC); and 3) there are arrears owed the custodian.

The same issues which arise on distribution of excess current support occur here. Many states do not, in fact, follow the law and give the money to the family. In states which do follow the law on distribution, a one-time payment can be used as

grounds for removing an otherwise eligible family from the AFDC program.

Recommendation 53: State agencies should make sure they are following the federal law in regard to distribution of arrears in AFDC cases. Such payments should be distributed within the same time frame as the distribution of current support and the pass-through.

Recommendation 54: The state agency should adopt a procedure for suspending an AFDC case due to payment on arrears when the payment will make the family ineligible for a period of less than six months.

Notice of Support Collections

An AFDC custodial parent's right to the pass-through, excess support and arrearage payments is effective only if she knows a collection has been made. Thus, she needs to receive notice of the support collection and an accounting of how that money was distributed. She also needs to have a process for challenging that distribution if she believes any error has been made.

Prior to 1984, there was no federal statute directly addressing this issue. Some states did give administrative hearing rights to AFDC custodians who challenged the distribution of the support collection. However, hearing requests were rare because few custodians knew that support had been collected on their behalf.

The CSEA of 1984 required the states to take one small step toward correcting this problem. States are now required to send at least an annual notice of collections to AFDC families.

The FSA requires that, by January 1, 1993, the notice must be sent monthly. 42 U.S.C. §654(5).[15] Hearing rights are not addressed by the FSA, however.

In the meantime, several courts have addressed the issue and found – as a matter of federal constitutional law – that periodic notice and a right to a hearing are required to effectuate fundamental due process. See, e.g., Beasley v. Harris, 671 F.Supp 911 (D.Conn. 1987); Berg v. Gardebring, 708 F.Supp. 238 (D.Minn. 1989)

States should avoid litigation by sending monthly notices of collection to AFDC families. Moreover, they should do so before 1993. At the same time, they should establish, if they have not already done so, procedures for challenging the distribution when the custodian feels the state has made an error.

This approach would fulfill the states statutory and constitutional obligations. It would also be consistent with the spirit of the FSA, allowing people to achieve greater independence. Indeed, it would be wise policy for states to reexamine their practice in establishing paternity, obtaining a support order and enforcing such orders to be sure that, at every stage in the process, the custodial parent is notified of what is going on. This would encourage her to feel it was her rights which were being pursued and to give the state information she might have that would be useful in negotiating with the noncustodial parent. This is an empowering approach designed to foster independence. See, e.g., N.Y. Dept. of Social Services 89 ADM-31.

Recommendation 55: States should (either administratively or by statute) implement monthly notice to AFDC and post-AFDC custodians of support collections made on their behalf as soon as possible. The monthly notice should be mailed out with the pass-through or other support payment, and should state who paid the support, the date of payment and how the payment was distributed.

Recommendation 56: State law should make administrative hearings available to custodians who believe that support has not been properly distributed under the law.

Recommendation 57: State law and procedures should be examined to make sure that the custodial parent receives notice of all actions proposed to be taken on her case, including court/administrative hearings and negotiations so that she can be fully informed of what is going on and keep the state informed on matters on which she has knowledge.

AN OVERVIEW

A large percentage of the Americans who lack medical insurance are children. There is growing awareness that some of these children could gain access to medical insurance through the child support system.

In the early days of IV-D, it was not clear that state agencies were authorized to pursue medical support. To deal with this issue, in 1984, Congress enacted legislation under which the Secretary of Health and Human Services was required to promulgate regulations obligating state IV-D agencies to petition for medical support whenever health insurance was available to the absent parent at reasonable cost. 42 U.S.C. §652(f). These regulations were issued in 1985. Since their promulgation, state IV-D agencies have been required to seek health insurance coverage and enforce health insurance orders whenever an absent parent has access to employment related or other group health insurance.

These regulations were of limited utility. At best, states used them to pursue medical support in new cases or cases where an order was being modified. The issue of medical support in ongoing cases was not even addressed. Moreover, on the enforcement side, it was not clear what states could do if 1) the absent parent failed to enroll the children in the health insurance plan or; 2) the absent parent enrolled the children, submitted claim forms, and then kept the money rather than paying the bill or reimbursing the custodial parent who had already paid.

Recognizing that problems existed, in 1988, HHS revised the regulations, greatly strengthening them in some areas. **First**, states are now required to have written criteria with which to identify existing cases which have a high potential for obtaining medical support. **Second**, states must petition the court or administrative agency to modify the underlying support order to include health insurance in these cases. **Third**, once the health insurance is obtained, the IV-D agency must provide the custodial parent with pertinent information about how to obtain services or file a claim. 45 C.F.R. §303.31. Congress has thus made it clear – and HHS has reiterated – that there is a major role for IV-D agencies to play in securing medical support for all children using the IV-D system.

Congress is also concerned about children who are insured through Medicaid. In the past, this has been primarily families receiving AFDC or qualifying as "medically-needy" under the Medicaid program. Some of these children could be covered by private insurance. From the state's perspective, it would be fiscally prudent to secure this insurance. In some cases, it would also be better for the children as such coverage could extend beyond the ages of Medicaid eligibility and would be available even when the custodial parent's income made the family ineligible for Medicaid. To facilitate this, in 1984, Congress required Medicaid recipients to assign their medical support rights to the state. 42 U.S.C. §1396k(a). It also amended the AFDC statute to require an assignment of medical support rights by families receiving AFDC. 42 U.S.C. §602(a)(26)(C). Unfortunately, it was 1986 before Congress also enacted legislation clarifying what the IV-D agencies were required to do with these assign-

ments, 42 U.S.C. §654(4), and 1991 before federal regulations on IV-D responsibilities to Medicaid families were issued, 56 *Fed. Reg.* 7988-8005 (Feb. 26, 1991) and 56 *Fed. Reg.* 8937-8933 (March 4, 1991).

CHANGES IN FEDERAL LAW

As noted in Chapter 5, the FSA requires states to have and use child support guidelines to establish and modify child support orders. Under the regulations, these guidelines must provide for children's health care needs through health insurance coverage or other means. 45 C.F.R. §302.56(c)(3). HHS gives states latitude to do this by either factoring the costs and/or premiums into the guidelines or by addressing the question in some other way. 56 *Fed. Reg.* 22345.

As noted in Chapter 2, federal regulations issued pursuant to the time frames requirement of the FSA make it clear that IV-D services – including medical support enforcement – must be made available to all IV-D families. The newest federal regulations reinforce this by stating that the agency must inform its non-AFDC clients that medical support enforcement services are available, secure any necessary information to pursue such support, and then pursue it. 45 C.F.R. §§303.30(b) and 303.31(c)(2).

In addition, both the FSA and the Omnibus Budget Reconciliation Act of 1989 (OBRA 89) provided Medicaid to new groups of children. The FSA created a new category of Medicaid families: those leaving AFDC due to employment. In the year following loss of AFDC, the families are said to be "in transition" and thus eligible for one additional year of Medicaid coverage.

In addition to this group, OBRA 89 added pregnant women and young children to the groups who must be covered by Medicaid. Eventually, states will be providing Medicaid to children whose family income is less than 133 percent of poverty and who are under age 6. These FSA and OBRA families must also assign their medical support rights to the state. They (and medically-needy Medicaid children) will be referred to here as Medicaid-only. The following rules apply to them:

- They are eligible for services without the need to file an application or pay an application fee, 45 C.F.R. §302.33(a)(2). Nor may they be required to pay any other fees or costs, id. §302.33(a)(3).

- They are required to assign to the state their right to medical support/payment for medical care from a third party. They may be asked to assign the right to cash child support but this is not a requirement, 45 C.F.R. §302.33(e)(1). Moreover, they must be told that their cash support rights need not be assigned, id. §302.33(e)(2).

- The medical support assignment terminates when the family/child no longer receives Medicaid except as to any unpaid medical support obligation which has accrued under the assignment, 45 C.F.R. §302.51(e)(2).

- When eligibility for Medicaid ends, the family must be informed within 5 working days that IV-D services will be continued unless the IV-D agency is notified by the family that they no longer wish to receive services, 45 C.F.R. §302.33(a)(4).

- Medicaid-only families must be provided all appropriate IV-D

services. If a Medicaid-only family wishes to limit these services to only those relating to medical support it may do so by notifying the state of the family's desire, 45 C.F.R. §302.33(a)(5). Thus, for example, if a family does not wish to have a cash child support established or wishes to continue a satisfactory informal cash support arrangement, it can inform the IV-D agency that it wishes to limit the agency's activity to medical support.

- If a Medicaid-only family wishes to claim "good cause" from pursuing medical support, it can make that claim to the Medicaid agency. The Medicaid agency must then inform the IV-D agency which will cease activity until the Medicaid agency makes its "good cause" determination, 45 C.F.R. §302.31(b).

IMPLICATIONS FOR THE STATES

1. Guidelines Issues

If a state's child support guideline does not currently address health care coverage, the guideline must be amended. States are not allowed to wait until the four-year guideline review required by the FSA takes place (see Chapter 5). They must act now. 56 *Fed. Reg.* 22343.

Moreover, HHS has made it clear that the health care issue must be addressed in the guidelines, not by some other statute. 56 *Fed. Reg.* 22345. HHS has also said that if the states do not make significant progress in dealing with the issue within a year, it will eliminate state discretion and require that health **insurance** coverage be included in the states' guidelines.

Obviously, if health insurance (either medical or dental) is available at little or no cost, the guidelines should make no adjustment in the cash support amount and simply require the decisionmaker to order that insurance be provided. If insurance is available – but at significant cost – the state has several options. The guidelines could disregard the cost, deduct the cost from the absent parent's gross income, or treat the cost the way child care is treated (i.e., as an add-on to the guideline amount which is pro-rated between the parents). Given how low most state guideline percentages are the latter seems the preferable approach.

An alternative would be to not require insurance unless it is available at no/low cost. Instead, the order could provide that actual costs be pro-rated between the parties. This approach poses significant enforcement problems, however, especially for IV-D agencies who would have to obtain a judgment every time costs are incurred in order to enforce payment against a recalcitrant noncustodial parent.

Recommendation 58: States must immediately review their child support guidelines and modify them, if necessary, to include a specific guideline provision on covering the medical and dental care needs of the children. If insurance is available to either parent, it should be ordered and any cost be pro-rated between the parents as an addition to the basic guideline amount. If neither parent has access to insurance, and for items not covered by insurance, the guidelines should pro-rate costs between the parents.

2. Identifying Cases Where Medical Support Should Be Sought

Without addressing the guidelines issues, current federal regulations require that, in obtaining or modifying a support order on behalf of a family which receives AFDC and/or Medicaid, the state IV-D agency must seek medical insurance, unless the custodial parent and the child already have satisfactory health insurance other than Medicaid. If a nonpublic assistance family is using IV-D, they must be told that medical support services are available and, the services must be provided if the custodial parent requests.

In either case, health insurance must be sought as part of every new or modified order, even if it is not currently available to the absent parent at reasonable cost and even if the children cannot be put on the current policy. As a result, when and if insurance becomes available, the absent parent will be required to seek it without the custodian having to seek a modification of the order.

Recommendation 59: State IV-D agencies should pursue medical support as provided in the child support guidelines in every new or modified support order. Special attention should be paid to including medical support orders in cases being reviewed as part of the state's FSA modification process. Such orders should include a requirement that health insurance be obtained even when it is not currently available.

In ongoing cases where a modification in cash support is not contemplated, the state must develop **written** criteria for determining when a modification for medical support should nonetheless be sought. This criteria must show that there is a high potential for obtaining medical support based on evidence that insurance is actually available at a reasonable cost and that the facts are sufficient to justify seeking a modification under state law. See, e.g., Ohio Admin Code §5101: 1-29-353(B)(1)-(5).

According to the federal regulations, an absent parent cannot be required to purchase expensive individual coverage for his/her children. However, if group coverage is available through employment or an organization (e.g., a union), then the state IV-D agency should seek an order providing such coverage. The group policy may be traditional insurance, health maintenance, or preferred provider plan, or any other type of coverage, such as a dental professional organization or individual practice association.

Thus, a state following federal law would first do a check through its parent locator system to determine which absent parents are employed or members of a union. This would allow them to determine the universe of potential cases. Inquiry could then be made of the employer/union to determine whether insurance is available. See, MD. Fam. Law Code Ann. 12-105(c)(x).

Oregon has taken this idea one step further. There, all employers must report on what health insurance is available to their employees and what insurance each employee has chosen. This information is part of the quarterly report employers file with the State Employment division. The state IV-D agency then accesses the information to determine whether medical support can be sought.

Recommendation 60: States should do a search of all ongoing IV-D cases where there is a support order to determine whether the order contains medical support. If it does not, then a parent locate should be done (if necessary) to determine whether insurance is available through an employer or a union. In those cases where it appears that health insurance is available, a modification should be sought in AFDC and Medicaid-only cases and where desired by the custodial parent in post-AFDC and non-AFDC cases.

Recommendation 61: To facilitate this process, states should enact legislation which requires employers to include information on health insurance available to their employees to the state employment system on a quarterly basis.

3. Enforcing Medical Support Orders

As noted above, simply obtaining a medical support order is not enough. There must be some way to monitor whether the noncustodial parent actually obtains the coverage and keeps it active. To address this issue, some states have recently enacted legislation requiring that medical support orders give absent parents a specific period of time (usually 30 days) to file with the court written proof that medical insurance has been obtained. If such proof is not filed, the custodial parent or state agency can serve a notice of intent to enforce. If the noncustodial parent does not quickly provide written proof, the court contacts the insurance provider and orders that the children be placed on the policy. Any premium is then deducted from the noncustodial parent's income. Mn. Stat. Ann. §§518.171(3) and (4); Or. Stat. Ann. §§25.255(3) and (4); Ohio Admin. Code §5101:

Virginia does not even wait for the absent parent to act or fail to act. It includes health care coverage notices in its income withholding notice. An income withholding order must inform the employer that health insurance has been ordered and that the employer is required to enroll the persons named in the order and deduct any premiums from the employee's wages. In IV-D cases, the employer must inform the state in which plan the children have been enrolled. VA. Code §20-79.3(5).

Ohio also has a comprehensive scheme. It makes an order for medical support binding on the obligor, the employer and any insurance company subject to the order. All are notified at the point the order is entered. Ohio Rev. Code §3113.217. As in Minnesota and Oregon, if written proof of coverage is not provided, there is a process for ordering coverage. In IV-D cases, the state agency notifies the court which then orders the employer to provide coverage. Any employer who receives the medical support order, must honor it and keep the IV-D agency appraised of any change in or termination of coverage. Moreover, the employer must keep the IV-D agency and obligee informed about the name, address and policy number of the coverage. Ohio Admin. Code §5101: 1-29-354.

Recommendation 62: All states should enact legislation that provides a process for enforcing medical support orders at the time they are entered. This process should establish a system in which the decisionmaker notifies the employer or other policyholder that coverage has been ordered. The notice should further instruct that the named persons are to be immediately placed on the policy and premiums deducted from the obligated parent. In income withholding cases, the notice should be issued with, or as part of, the income withholding order and inform the employer what to do if the combined income withholding and insurance premiums exceed the Consumer Credit Protection Act limits. The notice should also state that it is illegal to fine, refuse to hire or otherwise punish a person subject to a health insurance order.

Recommendation 63: State legislation should also provide that custodial parents have a right to obtain claim forms, ID cards and numbers directly from the insurance company. Such legislation should also require the insurance company to honor the custodial parent's signature as authorizing payment.

In addition, state law should make it clear that an obligated parent or employer who fails to provide ordered coverage is liable to the custodial parent for any medical expenses incurred from the date of the court order. Such an obligated parent should also be liable for contempt. In this way, it will be clear that medical support is as important as cash support and is to be taken seriously.

AN OVERVIEW

The vast majority of noncustodial parents are men. From a research prospective, we know remarkably little about these men. However, a few recent studies suggest the following:

- noncustodial fathers are very much like custodial mothers in education, ethnicity and religion. However, they usually have more work experience and earn higher wages.

- among recently divorced noncustodial fathers the poverty rate is about 15 percent. Among noncustodial fathers of nonmarital children the poverty rate is about 26 percent.

- among noncustodial fathers whose families use the AFDC system, the poverty rate is 40-50 percent.

This leads people to conclude that even if the IV-D system is vastly improved, most mothers using the IV-D system would not receive significant amounts of money: certainly not enough to end poverty for themselves and their children. Thus, there is a growing interest in providing education and training services especially to absent fathers in AFDC IV-D families. Advocates of this approach argue that these services will enable absent parents to obtain jobs (or better paying jobs) and will thus enhance the ability of these fathers to pay support. Those who see such programs as benevolent point out that there are few job training programs available for low-income men, especially young men. They see the child support system as a way of developing more programs for this population. Advocates of this approach also point out the fundamental unfairness of forcing AFDC mothers into JOBS programs while ignoring fathers who should be carrying their share of the burden.

However, some critics see these programs as potentially harmful to the very mothers they are supposed to help. Education and training programs (e.g., Job Training Partnership Act, JOBS, Voc. Ed) generally have too few resources to serve mothers who wish to participate. These critics ask whether it's a good use of resources to add even more potential participants to overburdened programs. In addition, history adds a caution. In the AFDC Work Incentive Program (WIN), evaluations indicated that males got the best training opportunities and thus the best paying jobs at the end. Another program which limited women's opportunities in order to serve men would be inappropriate. Finally, there is reason to doubt whether men with better income will actually use the money to support their children. Given that men with good jobs don't have a strong record in this regard, the skepticism seems well-founded.

Some states have, nonetheless, taken cautious steps in the direction of establishing programs to assist low-income fathers find jobs or take advantage of training programs.

In Maryland, for example, one county judge, working with a caseworker, set up a mandatory system to refer unemployed noncustodial parents to jobs. Working on a part-time basis, the caseworker was able to place 19 of 67 participants in the first year. In the next year, eight of 51 partici-

pants were placed in jobs by the caseworker. These modest results encouraged the county to provide additional funding so that the caseworker could work full-time, and the noncustodial parents could be offered other services such as skills testing, evaluation, and a brief course on job search skills. The state has now expanded this program to other counties.

Another highly touted program operates in Kent County, Michigan. The Absent Parent Support Project focuses on unemployed fathers who have defaulted on their support obligations to both AFDC and non-AFDC children. These fathers are referred to JTPA which conducts an assessment (through the local school district) and enters the father in a job club. After six weeks, if a job is not found, the father is given more intensive assistance or skills training. In the first seven months of operation, 633 referrals were made from the court to the program: 101 of these did not show up, and 201 became employed.

A third program operates in Indianapolis, Indiana and focuses on fathers aged 15-21 who are unemployed and owe support. The Teen Alternative Parenting Program (TAPP) encourages completion of high school or GED, provides pre-employment and job skills as well as parenting classes. Participants earn credit toward their $25 per week support obligation by participating in the program. So long as the father is successfully meeting the education and training goals, his current support obligation is deemed met.

CHANGES IN FEDERAL LAW

The Family Support Act (FSA) creates another approach for states interested in job training for absent parents. The FSA established a new program called JOBS to provide education, training and employment services to AFDC recipients.

The FSA allows HHS to permit up to five states to provide JOBS program services to noncustodial parents who are unemployed **and** unable to meet their child support obligations. Such programs may be mandatory or voluntary. Under the law, they must be evaluated and the results reported to HHS.

HHS has named these projects the "Parents' Fair Share (PFS) Demonstration." Additional funding has been secured from the Ford Foundation, the Pew Charitable Trusts and the federal Department of Labor to augment HHS funds. The Manpower Demonstration Research Corporation is providing technical assistance to interested states and will conduct the evaluation.

States received solicitations to be part of this demonstration project in Spring 1991. Sixteen sites applied and HHS contemplates having at least five sites selected by the end of October 1991. The projects will be operated for six years.

IMPLICATIONS FOR THE STATES

Some capable noncustodians are voluntarily unemployed or underemployed to minimize their obligation to support their children. Some who are self-employed or work in the underground economy, report little or no income even when they have money. States need strong policies to deal with these problems. Decisionmakers need the authority to issue seek work orders and/or to impute income in appropriate cases. See, e.g., Ill. Stat. Ann. ch. 40, para 1115. To avoid any constitutional attacks, these statutes need to clearly give such authority, both at the time an order is entered and as part of any enforcement proceeding.

Whether states should go beyond this and offer specific programs targeted toward low-skilled, under-educated and/or young fathers remains an open question. Many states were quite interested in applying to be part of the PFS Demonstration. Indeed, at least one state enacted legislation allowing its welfare agency to seek a waiver to participate in PFS before the federal Request for Proposal was even contemplated. See, N.D. Cent. Code §50-09-021.

Not all those interested will be allowed to participate in PFS. These other states will have to decide whether to proceed without the PFS waiver and funds. These states might consider targeting Job Training Partnership Act (JTPA) funds on this population. Florida is running a three-county demonstration project using this approach. In the Child Support Enforcement Employment Search Pilot Project, noncustodial parents of AFDC children who are unemployed, earn less than minimum wage or work less than 30 hours per week, may be referred to a three-week employability training workshop which include orientation, job skills assessment and mandatory job search. If a job is not found, the participant is referred to JTPA.

However, as with most programs in this area, there is little data on the impact of the Florida approach. Therefore, caution in this area seems warranted.

Recommendation 64: States should enact legislation giving decisionmakers the discretionary authority to issue seek work orders in cases where a noncustodial parent is unemployed or underemployed and cannot meet a child support obligation.

Recommendation 65: States which believe they can run programs without displacing opportunities for custodial parents should consider pilot projects which provide assistance to noncustodial parents on a voluntary basis to see if meaningful models can be developed and then expanded.

A Special Note

A few states will also face another child support-JOBS participation issue. These are the states which elect to have a Community Work Experience Program (CWEP) component to their JOBS program for custodial parents. Under CWEP, an AFDC recipient is required to be in a work and/or training program for a certain number of hours each month. The **maximum** number of hours the person can be required to participate in CWEP is ascertained by taking the family's AFDC grant and subtracting the amount that has been reimbursed by a child support collection. This number is then divided by the minimum wage.

> Example: Mrs. A receives an AFDC grant of $485 per month. Mrs. A's ex-husband pays the state $25 per month in child support and the father of her other two children pays $35. Her maximum hours of CWEP participation are calculated as follows: $485-$25-$35 divided by $4.25 equals 100 hours/month.

It is thus extremely important for the state to maintain accurate support payment records in order to eliminate the problem of asking someone to work in CWEP for too many hours. It is also critically important that custodial parents know what has been paid on their behalf so they can

determine if their CWEP obligation has been correctly calculated. The monthly notice of support collected (described in Chapter 7) is thus also important here.

Recommendation 66: States with Community Work Experience Programs (CWEP) must keep accurate, timely child support records so that they can correctly determine a participant's maximum CWEP obligation. These states should also implement their monthly reports of support collections to AFDC recipients no later than the date of CWEP implementation.

CHAPTER 10 – LOOKING TO THE FUTURE: CHILD SUPPORT AS AN ANTI-POVERTY STRATEGY

AN OVERVIEW

Implementation of the recommendations discussed in Chapters 2-8 would create an efficient and equitable child support enforcement system. Such a system would provide real benefits to custodial parents and children. It would allow some to escape poverty: it would allow others to live a middle-class existence.

However, as noted in Chapter 1, such a system would probably not have much of an anti-poverty effect for the majority of AFDC families. Certainly, it would improve their lot. But, because AFDC benefits are so low, those benefits even supplemented by the $50 pass-through and Food Stamps leave most AFDC families living below poverty.

Some states, recognizing this, have tried new approaches to the problem. One set of states (e.g., Georgia) has adopted policies which allow an AFDC custodian to keep child support in excess of $50 per month to supplement the AFDC grant. Another set of states (e.g., New York, Wisconsin) have obtained federal waivers to experiment with ways to urge custodians to enter the paid labor force by guaranteeing a minimal level of child support which, when combined with earnings, allows family income to equal or exceed the poverty line.

Other states should consider similar kinds of approaches in developing their anti-poverty policies.

CHILD SUPPORT AS A SUPPLEMENT TO AFDC

Under federal law, each state must develop a standard of need for AFDC families. This is the amount of money which it is necessary to have to live at a minimal level of decency in the state. Some states pay AFDC benefits equal to their standard of need. Over half, however, pay AFDC grants which are less than the standard of need. Thus, there is a "gap" between what the state says a family needs in order to survive and what the state pays the family.

Some states are authorized by federal law to "fill-the-gap" with child support. Others might be able to do so by applying for a federal waiver to try such an approach. However, Ohio recently tried this and was rebuffed so it may be necessary to amend federal law to open up this option. Indeed, the Commission on Interstate Child Support authorized by the FSA has tentatively recommended that this be done.

States Currently Allowed to use the "Fill-the-Gap" Approach

Prior to the enactment of Title IV-D of the Social Security Act, AFDC recipients who collected child support from a non-custodial parent simply kept the money. They then reported receipt of the money to the AFDC agency which counted the support payment as income. Most states subtracted the child support income dollar-for-dollar from the AFDC grant (i.e., $75 in child support received meant $75 less in AFDC).

Many states, however, did not make such a dollar-for-dollar reduction. These states were generally those in which there was a significant difference between the AFDC grant level and the standard of need. Some states allowed the family to keep all the support it received so long as total family income (e.g., the AFDC grant plus support) did not exceed the standard of need. Others allowed the family to keep some percentage of the support without reducing the grant.

As noted in Chapter 7, in 1975, as part of the new IV-D program, AFDC custodians were required to assign their support rights to the state and let the state make the collection. Thus, the money was not "income" to the recipient, and she did not have to report it. In many states, this change made no economic difference to the AFDC custodian. In the "fill-the-gap" states, however, the recipient faced a potential loss of income. To remedy this, just before the effective date of the IV-D law, Congress passed 42 U.S.C. §602(a)(28). This law states:

> ...in determining the amount of aid to which an eligible family is entitled, any portions of the amount collected in any particular month as child support pursuant to a plan approved under Part D of this subchapter, and retained by the state under §657 of this title, which(under the state plan approved under this part as in effect both during July 1975 and during that particular month) would not have caused a reduction in the amount of aid paid to the family if paid directly to the family, shall be added to the amount of aid otherwise payable to such family under the state plan approved under this part.

In other words, any state which, in July of 1975, chose to use support payments to "fill-the-gap" may continue to do so, so long as it specifies this choice in its state plan.

HHS recognizes six different methods for calculating "fill-the-gap" payments. It allows states to decide which one to use. In other words, a state does **not** have to use the same method for calculating the payment that it used per 1975, 51 *Fed. Reg.* 29,229 (Aug. 15, 1986). Thus, for example, a state which allowed a family to keep some but not all support pre-1975 could opt to allow the family to keep all support up to the standard of need in 1989.

According to HHS, as of July 1988, five states were taking advantage of the child support "fill-the-gap" provision. Georgia, Maine and Tennessee allow support to completely fill the gap; South Carolina and Mississippi allow partial filling. In those states if more than $50 per month in support is paid, AFDC families receive their basic grant, the $50 pass-through, **and** a supplemental child support payment. Obviously, these families are considerably better off than families for whom no support is being paid.

Again according to HHS, there are 14 other states which could revert to being "fill-the-gap" states by virtue of their having had state plans in July 1975 which allowed AFDC recipients to retain a portion of their monthly child support payment without experiencing a dollar-for-dollar reduction in the AFDC payment. These states are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Indiana, Kentucky, Missouri, New Mexico, Virginia, Washington, and Wyoming.

It is also possible that the following jurisdictions qualify: District of Columbia,

Guam, Hawaii, Kansas, Oklahoma, Maryland, Montana, Puerto Rico and the Virgin Islands. These are jurisdictions which were listed as eligible in an HHS promulgation of proposed rules to implement §602(a)(28) appearing at 45 *Fed. Reg.* 8371 (Feb. 7, 1980).

Of course, these jurisdictions can use a "fill-the-gap" approach only if there is a gap to fill. In the years between 1975 and the present, some of these jurisdictions have changed their budgeting methods so that the payment standard and the standard of need are now the same. However, if they do revert to a system where there is a gap between the two, then they may adopt a "fill-the-gap" approach.[16]

Obviously, it would be preferable to make the payment level reach the standard of need for all families, particularly if the standard of need adequately reflects the true cost of living in minimal decency. However, if a state legislature is unable or unwilling to do this, readoption of the "fill-the-gap" approach would affect a significant number of families.

Such a policy would allow states to help these families at minimal state cost (i.e., foregone reimbursement for the states' share of the AFDC grant which would have come from the support payment). It would also encourage noncustodial parents to pay support, and encourage custodial parents to cooperate in obtaining support.

At least 14 and possibly as many as 23 jurisdictions could do this as a matter of law. Other jurisdictions should encourage their federal legislators to amend §602(a)(28) to allow any state which wishes to do so to use "fill-the-gap" budgeting.

It should also be noted that of the five states currently using a "fill-the-gap" approach, the three which have opted to "fill-the-gap" completely up to the standard of need (Maine, Georgia and Tennessee) have found this approach to be the simplest to administer.

Recommendation 67. All states should establish realistic standards of need for AFDC families and reevaluate and change them (as appropriate) every three years. The standard of need should be at least the federal poverty line.

Recommendation 68. AFDC grants should be set at the revised standard of need. If a state is unable to do this, it should adopt a "fill-the-gap" policy, allowing the AFDC grant to be supplemented with child support up to the standard of need.

CHILD SUPPORT ASSURANCE

Almost every industrialized Western nation – except the United States – provides a package of cash and in-kind benefits to aid **all** families with children. A central component of most of these programs is a cash grant called the family or children's allowance.

Despite the existence of these allowances, many countries found there was still significant children's poverty – particularly in single-parent families. To address this problem, a new system was needed. "Advance maintenance payment systems" were seen to be the answer.

Under these systems, children with a noncustodial parent are entitled to a monthly grant in addition to the children's allowance. If the noncustodial parent is

unemployed, or can't be found or identified, the state funds the grant. Noncustodians who can be located and are employed are taxed a certain percentage of their income each month to fund the grant. If the noncustodial parent's income is too low to fully fund the grant, the state makes up the difference.

In other words, the state assumes primary responsibility for assuring a minimal level of decency to children with absent parents. It also assumes responsibility (through the tax system) for making sure noncustodial parents contribute to the support of their children when and if they are able to do so. Children whose noncustodial parent cannot be located or cannot contribute, are treated no differently than those with an available, solvent parent.

The advance maintenance payment program has several advantages over the American child support system. **First**, it greatly increases the chance that a noncustodial parent will pay. **Second**, it is a more universal system – providing help to families that receive social assistance and those who do not. **Finally**, it is simply more fair to children. They are not penalized if their noncustodial parent is unable or unwilling to contribute to their support.

It is not surprising, then, that there has been some movement in this direction in the United States in the past few years. The initial push has come from the academic community.

The most extensive work has been spearheaded by Irwin Garfinkel and his colleagues at the Institute for Research on Poverty at the University of Wisconsin. They have proposed an American version of advance maintenance called a Child Support Assurance System (CSAS). CSAS has three basic components: (1) a standardized formula or guideline for establishing the support obligation of noncustodial parents; (2) automatic income withholding to collect child support awards; (3) an assured minimum benefit to each child with a support order with the state making up the difference (if any) between what the noncustodial parent pays under the guideline and the guaranteed minimum.

Two states – Wisconsin and New York – decided to try Garfinkel's general approach on a pilot project basis. In both cases, the motivation was to see if a minimum guaranteed child support payment in lieu of AFDC would encourage AFDC custodians to pursue paying jobs. For, unlike an AFDC recipient, a recipient of a guaranteed child support payment will not have her benefits reduced drastically if she obtains work.

The Institute for Research on Poverty spearheaded the Wisconsin program. It developed a number of specific papers to justify such a system, estimated its costs under various sets of assumptions, and demonstrated its practicality. The state legislature enacted enabling legislation and the Child Support Enforcement Amendments of 1984 gave Wisconsin federal permission to include AFDC families in this experiment.

Wisconsin adopted the three basic principles of the Garfinkel CSAS: guidelines for setting support, enforcement through wage withholding, and a minimum guaranteed benefit for any low-income child for whom there is a child support order whether or not the family receives AFDC. It added an additional positive factor – a wage subsidy for low-income custodial parents to offset child care costs – and a negative factor, a surcharge on the custodial parents' income. (This latter was, in part, motivated by a desire to keep program costs down.)

This system would benefit non-AFDC children with a working mother whose noncustodial parent had low income.

> Example. The A family contains a mother and two children. Mrs. A is employed 20 hours per week and earns $4,160 per year. The father of the children works full-time and earns $8,000 per year. Under the guidelines, he would be obliged to pay support of $2,000 per year (25% x $8,000). The guaranteed CSAS payment is $3,528. This would be reduced by the contribution deemed under the $1,040 surtax on Mrs. A's income (25% x $4,160) for a net guaranteed payment of $2,488. Mrs. A would also receive a child care subsidy of $1,820 ($1.75 x 20 hours x 52 weeks). Thus, the A family income would be $8,468 ($4,160 + $2,488 + $1,820) or $2,308 higher than from child support and earned income alone.

For AFDC children, the benefit is not as clear.

> Example. The B family consists of a mother and two children with no income. They receive an AFDC grant of $517 each month. Assuming Mr. B was paying regular child support of $100 each month under the guidelines, the family would also receive the $50 pass-through for a total income of $567 per month, or $6,804 per year.
>
> The CSAS system would provide only $3,528 per year. The B's would thus have to continue receiving AFDC or Mrs. B would have to obtain employment. If she were able to obtain employment, she would quickly become ineligible for AFDC but she would keep the CSAS payment and obtain the child care subsidy. Thus, like Mrs. A, she would increase family income by working. If she did not seek work she would still need AFDC.

Indeed, researchers simulating the effect of this system concluded that AFDC mothers eligible for the CSAS benefit would significantly **increase** their participation in the paid labor force (because their potential income under such a system increases over AFDC or CSAS alone) while non-AFDC mothers would **decrease** labor force participation (since they could devote more time to their family responsibilities without suffering a severe loss of income).

Many believe that this would be a salutary result for low-income mothers. They point to the fact that most of these mothers want to work but need more options in balancing work and family responsibilities. They see a CSAS system as giving mothers more choices within the framework that most mothers are now employed in the paid labor market. Others, however, are concerned that this system eliminates the option of being a full-time mother, an option many low-income women prefer or feel compelled to pursue.

It would have been helpful, in evaluating these positions, if the Wisconsin system had actually been put in place. Unfortunately, this did not occur. The first two pieces of the law – guidelines and automatic income withholding were phased in. However, neither the guaranteed minimum nor the child care expense offset was ever implemented. Since federal authorization expires shortly, it is unlikely that they ever will be.

New York, however, is conducting an experiment called the Child Assistance Program (CAP). The goal of this project is to test out ways of allowing AFDC-eligible families to combine child support payments, wages, and a supplemental state payment to obtain income of at least the poverty line.

Seven counties offer the program to AFDC families. Any AFDC custodial parent who has a support order issued by a New York court which is payable through the IV-D agency can opt in. The state issues the family a child assistance payment when combined with income from a full-time job, provides the family an income which equals or exceeds the 1987 poverty level for a family of three. The family receives this payment in lieu of AFDC. The family also receives Medicaid and a special needs grant for child care.

Currently 1,230 families are enrolled in CAP. The average participant earns $650, receives a $300 CAP payment and $87 worth of Food Stamps, and receives a child care subsidy of $214 each month. The state considers the program to be very promising.

In fact, the child support assurance idea is currently receiving national attention. The National Commission on Children endorsed Congressional authorization of pilot projects to test out the idea. Senator Dodd (D-CT) has introduced pilot project legislation (S. 1411). Thus, it is possible that in the next two years, such a program will be considered by Congress and that, at the very least, states will be allowed to conduct demonstration projects.

Recommendation 69: States should encourage Congressional interest in the Child Support Assurance legislation. Once such legislation is in place, interested states should participate in the pilot project.

LOOKING BEYOND

Ultimately the American welfare system needs drastic revision–far beyond that contained in the Family Support Act. The child support provisions of the FSA do, however, offer progressive state legislators and IV-D program administrators an opportunity to move in a positive direction. Indeed, it is possible that, when we look at the FSA ten years from now, it will be the child support provisions which have had the greatest impact. That is a possibility – and our challenge.

END NOTES

1. There is a provision allowing HHS to waive the requirements under very limited circumstances.

2. HHS can suspend the penalty if a state submits a corrective action plan and implements it. If the state doesn't implement the plan or doesn't receive the desired results, the penalty will then be imposed. This has recently happened in several states. Ohio, for example, just had a nearly $7 million penalty assessed against it when it failed to meet its corrective action plan.

3. The Secretary of HHS has some discretion in easing standards for states with unusually high numbers of out-of-wedlock births.

4. Federal regulations also suggest that if the state constitution is a problem, the state could seek an exemption under 45 C.F.R. §302.70(d). See also 56 *Fed. Reg.* 22349 (May 15, 1991).

5. Federal regulations explicitly make 90 percent funding available for costs of expert witnesses as well as doing repeat testing if necessary. 45 C.F.R. §304.20(d).

6. It should be noted that federal regulations now require IV-D agencies to identify and use labs, identified as low cost. The list of such labs must be made available to courts, law enforcement agencies and the public. 45 C.F.R. §303.5(c).

7. While Mistretta is a federal case, the constitutional provisions at issue appear in almost all state constitutions as well. Indeed, state constitutions might well limit a legislature's power to delegate the responsibility for guidelines even more than the federal constitution does. Thus, state constitutions should also be examined.

8. In AFDC cases, the state could refuse to review if it would not be in the best interests of the child and neither parent requests. This language, if read literally, however, is redundant.

9. It should be noted that many IV-D orders start out as non-IV-D orders set by courts. In those cases, the orders will have to be modified by courts (see e.g., Starks v. Utah Dept. of Social Services, 750 P.2d 199 (Utah App. 1988). Thus, state law on judicial modifications for non-IV-D orders will have to cover IV-D orders which were initially set by a court as well.

10. Agencies should, of course, be doing modifications when asked for this service. However, as a practical matter, these agencies will not be doing large numbers of modifications prior to the guidelines provision if past performance is any indication.

11. In a few states, a collection fee may be deducted from the support payment.

12. The one exception to this is if the collection was made through a federal income tax intercept. Then arrears owed the state must be paid first.

13. As this volume goes to press, proposed federal regulations have been issued which extend somewhat the time frame in which AFDC agencies are to distribute the pass-through. 56 *Fed. Reg.* 42581-84 (August 28, 1991).

14. A slight modification of this regulation has also been proposed. Id.

15. HHS can determine that this would impose an unreasonable administrative burden on a particular state and allow that state to send quarterly notice.

16. Under the FSA, states are required to reevaluate their standard of need and their payment standard every three years. They are not, however, required to raise either their standard of need or their payment level. In states which do both reevaluate and revise their standard of need even if there currently is no gap, there may be one in the future.

APPENDIX A

STATES RANKED BY GRADE

State	Overall Grade	State	Overall Grade
1 Alabama	C	27 Nevada	D
2 Iowa	C	28 Hawaii	D
3 Maine	C	29 Alaska	D
4 Connecticut	C	30 Louisiana	D
5 North Dakota	C	31 Virginia	D
6 Michigan	C	32 Missouri	D
7 South Dakota	C	33 New York	D
8 Idaho	C	34 Rhode Island	D
9 Pennsylvania	C	35 Massachusetts	D
10 Utah	C	36 Florida	D
11 North Carolina	C	37 Georgia	D
12 Oregon	C	38 Montana	D
13 Indiana	C	39 Wyoming	D
14 Arkansas	C	40 Colorado	D
15 New Jersey	C	41 Kentucky	D
16 Wisconsin	C	42 Mississippi	D
17 Minnesota	C	43 West Virginia	D
18 Delaware	C	44 Kansas	D
19 Texas	C	45 Arizona	D
20 Washington	D	46 New Mexico	D
21 Tennessee	D	47 California	D
22 Nebraska	D	48 Illinois	D
23 Ohio	D	49 Maryland	D
24 New Hampshire	D	50 D.C.	D
25 Vermont	D	51 Oklahoma	F
26 South Carolina	D		

Source: Child Support Enforcement Report Card, prepared by the Staff of the House Committee on Ways and Means (WMCP: 102-1), Jan. 3, 1991.

APPENDIX B

OCSE GRADES ASSIGNED BY STATES

Overall Grade--C

Activity	Grade
1. Establishing standards for state child support enforcement programs	C
2. Establishing minimum organizational and staffing requirements for state units	D
3. Reviewing and approving State plans	C
4. Conducting audits and evaluating State programs	C
5. Assisting States in establishing adequate reporting procedures and maintaining records of operations in each State	D
6. Providing technical assistance to the States to help them establish effective programs	D
7. Operating the Federal Parent Locator Service	C
8. Certifying child support obligations for collection by the Internal Revenue Service	B
9. Reviewing and approving annually updated automatic data processing planning documents	C
10. Overall, how would you grade your regional office?	C
11. Overall, how would you grade the national office?	D

Source: Child Support Enforcement Report Card, prepared by the Staff of the House Committee on Ways and Means (WMCP: 102-1), Jan. 3, 1991.

APPENDIX C

PATERNITY ESTABLISHMENT BASELINE PERCENTAGE AS OF 1988

State	Paternity Baseline	State	Paternity Baseline
Alabama	67	Nebraska	25
Alaska	27	Nevada	48
Arizona	16	New Hampshire	41
Arkansas	61	New Jersey	64
California	0	New Mexico	17
Colorado	29	New York	46
Connecticut	80	North Carolina	58
Delaware	0	North Dakota	73
D.C.	25	Ohio	0
Florida	38	Oklahoma	11
Georgia	30	Oregon	42
Hawaii	42	Pennsylvania	0
Idaho	35	Rhode Island	20
Illinois	24	South Carolina	34
Indiana	51	South Dakota	69
Iowa	81	Tennessee	30
Kansas	36	Texas	22
Kentucky	30	Utah	67
Louisiana	39	Vermont	42
Maine	61	Virginia	31
Maryland	0	Washington	41
Massachusetts	41	West Virginia	18
Michigan	57	Wisconsin	59
Minnesota	0	Wyoming	17
Mississippi	28		
Missouri	15	Simple Mean	30
Montana	20		

APPENDIX D

SOURCES OF INFORMATION ON GUIDELINES DEVELOPMENT

Haynes, M., *Effective Advocacy Under Child Support Guidelines, in Alimony, Child Support and Counsel Fees* (Matthew Bender & Co., Inc., 1990)

Lewin/ICF, *Estimates of Expenditures on Children and Child Support Guidelines* (U.S. Department of Health and Human Services, Office of Planning and Evauation 1990)

National Center for State Courts, *A Summary of Child Support Guidelines* (U.S. Department of Health and Human Services, Office of Child Support Enforcement 1990). The Center also publishes a copendium of state guidelines.

Takas, M., *The Treatment of Multiple Family Cases Under State Support Guidelines* (U.S. Department of Health and Human Services, Office of Child Support Enforcement 1991)

Williams R. and Advisory Panel on Child Support Guidelines, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* (U.S. Department of Health and Human Services, Office of Child Support Enforcement 1987)

Women's Legal Defense Fund, *Essentials of Child Support Guidelines Development: Economic Issues and Policy Considerations*
(1986)

Women's Legal Defense Fund, *Critical Issues, Critical Choices: Special Topics for Child Support Guidelines Development*
(1987)

10 Fam. Adv. 1 (Spring 1988) (The entire issue of this publication of the ABA Family Law Section is devoted to guidelines issues.)

APPENDIX E

CROSS REFERENCE CHART OF THE CHILD SUPPORT PROVISIONS OF THE FAMILY SUPPORT ACT OF 1988

FSA Section	Statute	Regulation
101	42 USC §§666(a)(1), 666(a)(8) & 666(b)	Proposed
102	42 USC §§602(c)(8)(A)(vi) & 657(b)(1)	45 CFR §§302.51(a)(9), (a)(5) and (b)(1)
103	42 USC §667	45 CFR §302.56
104	42 USC §654 note	Proposed
111	42 USC §652(g)	None
112	42 USC §655(a)(1)(C)	45 CFR §304.20(d)
121	42 USC §652(h)	45 CFR Part 303
122	42 USC 652(i)	45 CFR §303.32(f) 45 CFR §232.20(d)
123	42 USC §§652(d) & 655(a)	Proposed
124	42 USC §653(e)(3)	None
125	42 USC §405	None
126	42 USC §666 note	None
127	42 USC §658(d)	45 CFR §304.12(a)
128	42 USC §778 note	None
129	42 USC §669	None

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